No. 589

DEC 27 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1955

V. P. SERODINO, INC.,
Appellant.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On appeal from the United States District Court for the Southern District of Ohio.

JURISDICTIONAL STATEMENT

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellant.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

BARNARD & MILLER, 33 S. Wacker Drive, Chicago 6. FRanklin 2-0342

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JURISDICTIONAL STATEMENT

FINDINGS AND CONCLUSIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of Ohio, Western Division, are attached as Appendix A. They are not reported; the Court rendered no opinion. The decision of the Interstate Commerce Commission is reported in 292 I.C.C. 681, and is attached as Appendix B.

JURISDICTION

This action was brought under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered June 17,

1955, upon findings of fact and conclusions of law filed May 16, 1955. A motion of plaintiff for new trial and for more definite findings, filed June 16, 1955, was denied by order of the District Court entered August 24, 1955, and the notice of appeal was filed in that Court by appellant on October 24, 1955. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Secretary of Agriculture* v. *United States*, 347 U.S. 645; *Thompson* v. *United States*, 343 U.S. 549; *American Trucking Assoc.* v. *United States*, 344 U.S. 298.

STATUTE INVOLVED

The pertinent provisions of Part III of the Interstate Commerce Act, 49 U.S.C. 901 *et seq.*, are as follows:

"Sec. 303(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

QUESTIONS PRESENTED

1. What is the meaning of the words "transportation of commodities in bulk" as used in 49 U.S.C. 903(b)?

2. Were the findings and conclusions of the Commission in accordance with the provisions of that subsection?

STATEMENT

Serodino holds no operating authority under the Interstate Commerce Act and has engaged in interstate transportation for hire of coal and of scrap iron and steel, in bulk in barges, on the Tennessee and Ohio Rivers, upon the assumption that such transportation was exempt from regulation by 49 U.S.C. 903(b).

Certain regulated water carriers, fearing added competition, made formal complaint to the Commission charging that the uncertificated operations of Serodino in transporting scrap were illegal. By such means, the regulated water carriers sought an interpretative ruling from the Commission to the effect that the 903(b) exemption does not apply to transportation of scrap.

The Commission conducted a full administrative proceeding (292 I.C.C. 681), in which it was agreed that scrap, as customarily transported by Serodino and by water carriers generally, is without wrappers or containers and is received and delivered by the carriers without transportation mark or count; the Commission recognized also that there was no material difference in the custom of the trade as of June 1, 1939, and the present time. Further, the Commission found that Serodino's "operation by water has been confined to the transportation of coal and scrap (not more than three bulk commodities) in open-top barges". The Commission observed, therefore, that

Serodino's "transportation of coal needs no authority, and the same is true of scrap if it is determined that the movement is 'in bulk' ".

There is difficulty in stating fairly what the Commission did with the case, because the approach of its report to the question of statutory meaning is confused. The report seems in places to be construing the words "in bulk" while at other times it refers to "commodities."

While recognizing that scrap is heaped loose, in open-top barges, and is in bulk in the dictionary sense, the Commission found that the regulated carriers have not customarily transported scrap in exempt tows but have chosen to subject their transportation to regulation by including commodities not handled in bulk (or more than three commodities) in each tow. It decided that the words "in bulk" do not carry their dictionary meaning as they are used in 903(b). Instead, the Commission said those words are used to describe "fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece." The Commission also considered the physical characteristics, preparation and handling of scrap as compared with other commodities, and concluded "that scrap is properly characterized as falling within the category of non-bulk commodities."

The Commission thereupon held that the transportation of scrap is not "transportation 'in bulk' " within the meaning of those words in section 903(b); it ordered Serodino to cease and desist from unauthorized transportation of scrap.

In this action to set aside the Commission's order, the Commission admitted that scrap is a commodity but alleged

that it is not a commodity within the meaning of 903(b). The United States admitted that scrap is a commodity, but denied that it can be transported in bulk under the provisions of 903(b).

The court below dismissed the complaint without opinion. The court held (1) that the Commission has authority under 49 U.S.C. 904 to determine what is a commodity in bulk under 49 U.S.C. 903(b); and (2) that the Commission's finding that scrap iron and steel is not a commodity in bulk within the meaning of 49 U.S.C. 903(b) was predicated rationally upon adequate findings supported by substantial evidence. The court stated no conclusion as to the statutory meaning of the words "transportation of commodities in bulk".

THE QUESTIONS ARE SUBSTANTIAL

The interpretation of 49 U.S.C. 903(b) presents a question which is committed by law to the reviewing court. Administrative Procedure Act, Sec. 10 (e), 5 U.S.C. 1009-(e). No claim has been made by the Commission that it holds discretionary power under 903(b). The court below did not find such power in the Commission. It sustained the Commission's order on the basis of 49 U.S.C. 904, which merely authorizes the Commission generally to hear and decide a complaint that a water carrier has failed to comply with the statute.

The question in this case, committed by law to the reviewing court, is both substantial and narrow. It arises from the action of the Commission in re-writing the words of the statute. We urge that the Commission's interpretation of 903(b) is not only wrong, but that it is without any rational basis in law.

Section 903(b) exempts bulk transportation upon three conditions, all found and admitted by the Commission as to Serodino: (1) that the vessels being navigated as a unit are used for bulk transportation of not more than three commodities; (2) that the commodities so transported are loaded and carried without wrappers or containers and are received and delivered without transportation mark or count; and (3) that such practice was the existing custom of the trade as of June 1, 1939.

The Commission not only recognized that all conditions of the statute were met, but it also admitted that the scrap was heaped loose in accordance with the natural and common import of the words "in bulk". It grounded its decision upon a substitution of the word "fungible" for the statutory words "in bulk".

There is no authority, legislative or judicial, for such substitution. When the law was enacted, both the Commission and its Bureau of Water Carriers interpreted the words in the dictionary sense. Administrative Ruling No. 2 (1941). *John L. Goss Corp.*, 250 I.C.C. 101 (1941); *Ralph Raike Applications*, 250 I.C.C. 177 (1942).

The sole precedent upon which the Commission relied to reject the words of the statute and substitute other words therefor was a dictum of its own Division 4 two years after the enactment of 903(b). *Mulqueen Contract Carrier Application*, 250 I.C.C. 436 (1942).

Mulqueen does not constitute a long standing administrative interpretation entitled to control or influence the decision of the reviewing court. It did not go to the entire Commission; the case was not reviewed in court, and was cited only twice prior to the present case. There has not

been any prior case in which the rights of parties were affected by the *Mulqueen* dictum.

All other cases in which the Commission mentioned 903-(b) were actually decided under a different section of the law or involved failure to meet one of the stated conditions of 903(b). *Foreman-Gregory Co.—Exemption, Section 303-(e)*, 250 I.C.C. 51 (1941); *Towage of Floating Objects (Logs and Piling In Rafts)*, 250 I.C.C. 525 (1942); *G. B. Zigler Co., Contract Carrier Application*, 265 I.C.C. 404 (1948); *Callanan Road Improvement Co., Extension—Towage*, 285 I.C.C. 137 (1952).

The action of the Commission in rephrasing the statute according to *Mulqueen* was not and could not rationally be grounded upon the underlying purposes of regulation or declared policy of Congress.

CONCLUSION

We submit that the questions presented by this appeal are substantial and important, and the court below erred in failing to make an independent, judicial interpretation of the statute.

Respectfully submitted,

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellant.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

December, 1955.

PROOF OF SERVICE

I, Robert N. Burchmore, one of the attorneys for V. P. Serodino, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1955, I served copies of the foregoing statement on the several parties, as follows:

1. On the United States by mailing copies duly addressed with air-mail postage prepaid to:

The Solicitor General, Department of Justice, Washington 25, D. C.
Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington 25, D. C.
E. Riggs McConnell, Special Assistant to Attorney General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies duly addressed with air-mail postage prepaid to:

Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.
H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On intervening defendants by mailing copies duly addressed with first-class postage pre-paid to their respective attorneys of record as follows:

Lewin W. Wickes and John W. Hudson, 603 Dixie Terminal Building, Cincinnati 2, Ohio.
John S. Mason, Dravo Bldg., Pittsburgh, Pa.
R. Granville Curry, 631 Southern Bldg., Washington, D. C.
Kenneth J. McAuliffe, 233 Broadway, New York, N. Y.
Harry C. Ames, Jr., Transportation Bldg., Washington, D. C.
Donald Macleay, Commonwealth Bldg., Washington, D. C.
John H. Eisenhart, Jr., 1319 F Street, N.W., Washington 4, D. C.

ROBERT N. BURCHMORE,
Attorney for V. P. Serodino, Inc.,
2106 Field Building,
Chicago 3, Illinois.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

V. P. SERODINO, INC., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 3488.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action to set aside an order of the Interstate Commerce Commission coming on for hearing on March 25, 1955, upon the plaintiff's complaint and the defendants' answer thereto, and the court having received in evidence a transcript of the record of the proceedings before the Interstate Commerce Commission, now, after reviewing the said record in its entirety and after hearing the oral arguments of counsel for the respective parties, and after considering the said arguments and the written briefs of counsel, the court makes and enters the following:

FINDINGS OF FACT

1. This is an action to set aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, which was entered under Title 49, U.S.C., Sections 903(b), 904 and 909, in a proceeding designated as Docket No. 31147, also embracing Docket No. 31147 (Sub-

No. 1), and Docket No. 31147 (Sub-No. 2), *Union Barge Line Corp.* v. *Rose Barge Line, Inc., et al.,* whereby the Commission found that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in Section 303(b) of the Interstate Commerce Act, 49 U.S.C. 903(b); that the defendant, V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron and steel scrap, in bargeloads, without a certificate or other form of authority required by Part III of the Interstate Commerce Act, 49 U.S.C. 901-923; and that this defendant should promptly cease and desist from such unauthorized transportation.

2. The proceeding before the Commission was instituted by complaints filed by Union Barge Line, Inc., American Barge Line Company, and Mississippi Valley Barge Line Company. Petitions for intervention of the complaints were filed by Arrow Transportation Company, National Water Carriers Association, Inc., Waterways Freight Bureau, Rail Carriers in Eastern Territory, Inland Waterways Carriers' Freight Association, The Columbia Transportation Company, Inc., and Great Lakes Shipowners Association.

3. The proceeding was assigned for hearing by the Commission before an examiner, and hearings were held March 18, 1953, at Washington, D. C., and May 18, and 19, 1953, at Cincinnati, Ohio. At the hearing the complainants appeared with counsel, interveners in support of the complaint with counsel, and defendant V. P. Serodino, Inc., (plaintiff herein) appeared with counsel. Testimony and evidence were received by the examiner from the parties to the proceeding.

4. The examiner's proposed report was served October 1, 1953, on the parties to the proceeding. In his proposed report the examiner found that V. P. Serodino, Inc., had been engaged in the transportation by water of scrap iron and steel in bargeloads in interstate commerce without a certificate or other form of authority required by Part III of the Interstate Commerce Act, and that V. P. Serodino, Inc., should promptly cease and desist from such unauthorized transportation, unless and until V. P. Serodino, Inc., had obtained appropriate authority. The examiner also found upon the evidence of record that scrap iron and steel as transported by water in interstate commerce did not constitute a commodity in bulk within the meaning of 49 U.S.C. 903(b).

5. Subsequent to the examiner's report, exceptions were filed by plaintiff herein and by certain interveners in support of plaintiff. Replies to the exceptions were filed by the complainants, and interveners in support of complainants. In their exceptions interveners in support of V. P. Serodino, Inc., requested oral argument before the Commission.

6. Oral argument was conducted before the Commission, Division 4, on March 24, 1954, at Washington, D. C.

7. Thereafter the Commission issued its report and order decided June 15, 1954, in which the Commission concluded:

> We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in section 303(b) of the act; that the defendant, Rose Barge Line, Inc., has ceased the transportation of scrap iron, and that the entry of an order

against it is unnecessary; that the defendant, V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap, in bargeloads, without a certificate or other form of authority required by part III of the act; and that this defendant should promptly cease and desist from such unauthorized transportation.

8. The Commission also found that V. P. Serodino, Inc., was engaged in the transportation of scrap iron and steel by water in interstate commerce without authority from the Commission; that scrap iron and steel consists of scraps or pieces of iron of various sizes, shapes and weights, having value chiefly for remelting purposes; that scrap as customarily shipped and transported is without wrappers or containers and that it is received and delivered by the carriers without transportation mark or count; that scrap is generally loaded and unloaded by machinery and not by hand; that most scrap is lifted piece by piece, by crane and magnet, because of its large size; that in some instances scrap is unloaded by use of a hand shovel only where a magnet cannot reach a few pieces remaining in the holds of the vessels; that scrap partakes of some of the characteristics of both bulk and nonbulk commodities, but that no comparison was made with any other well-recognized bulk commodities whose variations in size and weights, absence of internal mobility and lack of homogeneity, as between its many pieces, are as pronounced as in the case of scrap; and that marked contrast between commodities which are poured, scooped or shoveled, and between the method of handling scrap iron or steel, makes the latter commodity not a commodity within the exemption provisions of 49 U.S.C. 903(b) and the Commission's decisions thereunder.

CONCLUSIONS OF LAW

From the foregoing facts the court concludes:

1. The court has jurisdiction of this suit and venue is proper under Title 28 U.S.C., Sections 1398, 2284 and 2321-2325; and Section 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9).

2. The Interstate Commerce Commission had jurisdiction to enter the order complained of under Part III of the Interstate Commerce Act, 49 U.S.C., Sections 901-923.

3. The ultimate finding of the Commission that V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap in bargeloads without a certificate or other form of authority required by Part III of the Interstate Commerce Act, 49 U.S.C. 901-923, and that V. P. Serodino, Inc., should promptly cease and desist from such unauthorized transportation, was predicated rationally upon adequate basic findings which were supported by substantial evidence.

4. The Commission, under 49 U.S.C., Section 904, has the authority to make a determination of what is or what is not a commodity in bulk within the terms of the provisions of 49 U.S.C. 903(b).

5. The finding of the Commission that scrap iron and steel is not a commodity in bulk within the meaning and terms of 49 U.S.C. 903(b) is supported by substantial evidence and not arbitrary or unreasonable.

6. The order of the Commission requiring plaintiff to cease and desist from unauthorized transportation in interstate commerce is legal and valid.

7. The injunction should be denied and the complaint dismissed.

system and its connecting waterways, generally is such as to bring it within the regulatory provisions[2] of the act. A cease and desist order against the defendants is sought. The principal objective of the complainants, however, is an authoritative determination as to whether transportation of scrap iron is or is not within the exemption provisions of section 303 (b) of the act.

The Waterways Freight Bureau and several associations of water carriers intervened at the hearing in support of the complaints, and several unregulated water carriers[3] intervened in support of the defendants, but introduced no evidence. The complaints were heard upon a common record and will be disposed of in one report.

Only one defendant, Serodino, sought to defend at the hearing. Earl C. Rose, Jr., who was subpenaed as a witness by one of the complainants, showed that although Rose Barge Line, Inc., had towed scrap for Serodino on and between August 15, 1952, and February 1953, it had since then transported none and had ceased such operations. Serodino will hereinafter be referred to as the defendant.

Scrap iron, as now transported in barges on the inland waterways and in self-propelled vessels on the Great Lakes, consists of scraps or pieces of iron of various sizes, shapes, and weights, having value chiefly for remelting purposes. For barge movement, scrap is billed as "scrap iron for remelting purposes only." So far as appears, all of the scrap iron here considered is used for that sole purpose by the various steel mills. The record refers to scrap iron and also to scrap steel. They are practically identical, and the term "scrap" as used herein will refer to both.

Section 303 (b) of the act, enacted in 1940, reads as follows:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

The defendant admits that it is engaged as a carrier by water, upon the Tennessee River, in transporting scrap. This is because of its

[2] That is, the requirement of a certificate and published tariff rates if a common carrier, or a permit and schedule of minimum rates if a contract carrier.

[3] Bull Towing Company, George P. Crounse, doing business as George P. Crounse Company, Greenville Towing Company, Inc., Walter G. Hougland Sons, Inc., A. L. Mechling Barge Lines, Inc., and River Company, Incorporated.

belief that such transportation is in bulk, and hence exempt from the requirement of a certificate of authority or the publication of a tariff of rates.

With reference to the parenthetical clause in the statute quoted above, dealing with the "custom of the trade" as of June 1, 1939, the record affirmatively shows that there is no material difference between the custom then and now.

In the determination of the major issue, the parties draw comparisons with the circumstances affecting the transportation of other commodities, some of which are clearly "in bulk." The issue is narrowed by the fact that liquid commodities in tank vessels are exempted specifically by a separate section (section 303 (d)) of the act. Thus, in the further discussion herein there is no need to consider liquid commodities in bulk.

It is agreed that scrap, as it is customarily shipped and transported by the defendant and water carriers generally, is without wrappers or containers, and that it is received and delivered by the carriers without transportation mark or count. This fact brings into sharp focus one of the major disagreements among the complainants, on the one hand, and the defendant and interveners in its support, on the other. To illustrate by skeletonizing the statute somewhat, it reads: "This subsection shall apply only in the case of commodities in bulk which are * * * loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." The complainants contend that to be exempt as a bulk commodity, the scrap must not only be "in bulk," but that it must, additionally, meet the further limitations or requirements set forth in the above-quoted words following the asterisks. The defendant, in effect, contends that the words following the asterisks are not further limitations or requirements, but instead are merely definitive of "in bulk," as though the statute had been written thus: "This subsection shall apply only in the case of commodities in bulk, i. e., those which are loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count."

The point of view of the regulated water carriers is better understood after observing the physical characteristics of their general method of operation. The chief characteristic, insofar as this proceeding is concerned, is their operation upon the rivers or inland waterways in flotillas of barges or "integrated tows." It is fairly common practice for such a carrier to move at 1 time, in 1 tow, from 16 to 20 loaded barges. The average tow of 1 of the complainants is 12 to 15 barges. The act provides that for the purposes of this exemption "two or more vessels while navigated as a unit shall be considered to be a single vessel." While as a theoretical matter the exemption,

limited to not over three bulk commodities, applies alike to both regulated and unregulated carriers, as a practical matter the former on this record are virtually unanimous in stating that they do transport commodities which are "in bulk," such as sand, gravel, ore, and grain, usually in the same tow with nonexempt commodities. In moving such bulk commodities, the complainants treat them the same as nonbulk articles, by charging their published tariff rates.

The Union Barge Line states that 75 percent of the commodities which it moves are "susceptible" of exemption because in bulk, but they are handled the same as regulated traffic. This carrier estimates that 80 percent of its gross revenue is obtained from traffic susceptible of bulk exemption. In 1953 it lost a job of towing some 300,000 tons of bulk manganese ore, and also the towing of a considerable volume of bulk sulphur. The inference is that this traffic was lost to unregulated carriers.

The Mississippi Valley Barge Line also transports considerable scrap, and no change in its method of handling scrap has occurred in the last 12 years. It has never considered scrap as an exempt commodity. Similarly, it handles coal and sulphur, both admittedly bulk commodities, as regulated traffic for the same practical considerations above pointed out. Witness for this company expressed the view that it would not use the exemption even if scrap were clearly exempt, and even though over 50 percent of its total tonnage is now potentially exempt as bulk traffic. What this carrier fears is not a possible change in status of scrap from nonbulk to bulk (exempt) as it directly affects its own operation, but rather the prospect that such change of status would open the gates to the added competition of unregulated carriers of bulk traffic only.

The towing of barges, and especially of flotillas of barges in integrated tows, appears to be nonexistent on the Great Lakes. Water transport there is largely, if not wholly, in self-propelled vessels, due to the fact that storms on the Great Lakes are sometimes of an intensity equal to those on the ocean; and barges in integrated tows could not survive in such storms. Fundamentally, however, the position of the Great Lakes operators in these proceedings is the same at that of the associations of carriers operating on the rivers. They all express the view that scrap as generally transported upon the lakes and the rivers is not a bulk commodity.

Serodino testified that he (presumably as an individual) was engaged in the scrap business from 1941 to 1946, serving the Wheeling Steel Corporation and the American Rolling Mill Company. He incorporated in 1946. There is no evidence disclosing whether or to what extent his scrap business at that time included any operation on his part as a water carrier. The defendant is now a water carrier.

It began the operation of water terminals at Decatur, Ala., and Chattanooga, Tenn., both on the Tennessee River, in January 1952, and is now engaged in the transportation of coal on the Tennessee River and scrap on the Tennessee and Ohio Rivers. The defendant owns 2 tow boats of 200 and 400 horsepower, respectively, and leases 1 of 800 horsepower. It owns 18 and leases 21 standard steel open-top, or hopper-type, barges. Its operation by water has been confined to the transportation of coal and scrap (not more than three bulk commodities) in open-top barges. Its transportation of coal needs no authority, and the same is true of scrap if it is determined that the movement is "in bulk." The overall tonnage of scrap moved by the defendant is not shown. Rose, during the period previously mentioned, towed 28 bargeloads for the defendant's account.

By way of further attempt to clarify and narrow the issues, it may be stated that extremes in loading, unloading, or transportation of scrap by water may not be considered as controlling here. The generally prevailing practice in the industry must govern. To illustrate, it is conceivable that there could be a straight bargeload or tow of a rare grade of scrap called borings, turnings, and drillings. Such a straight load, meaning not mixed with other grades, would be homogeneous, could be poured, and probably would qualify as a commodity in bulk; but no such shipment has ever moved, so far as this record shows. The question to be determined is one of broad application to the water-carrier industry, both regulated and unregulated.

Evidence of existing practices.—The basic facts are clear and free from dispute. Scrap as an article of commerce originates in almost any town or village, but particularly in cities where waste metal accumulates in manufacturing articles from iron. From these innumerable primary origins carloads, where practicable, are shipped to larger wholesale dealers, some of them located at ports, such as Memphis, Tenn., New Orleans, La., Houston, Tex., where the incoming carloads are consolidated into bargeloads for movement to steel mills, principally in the Pittsburgh, Pa., area.

Most of the scrap is "prepared" scrap. This means that the original unserviceable articles, such as old locomotives, used steel rails, automobiles, cars, machines of all kinds, metal beds, and furniture, have been cut, stamped, sheared, or compressed into pieces, strips, or bundles as dictated by the needs of the consuming consignee, namely, the steel mill. These needs in turn are determined usually by the type of plant furnace, blast or open-hearth, and the sizes of the furnace doors. This preparation frequently occurs before rail movement, but virtually always before the subsequent movement by water.

The preparation of scrap is largely for the purpose of segregating different grades of scrap having different prices and values. An Office

of Price Stabilization regulation in evidence describes in detail the specifications by size, weight, quality, et cetera, of some 35 grades of scrap of dealer and industrial origin, and 35 other grades of railroad origin. Specific ceiling prices per gross ton were therein set for leading scrap-consuming cities on a so-called base grade, No. 1, averaging about $41.[4] The prices for the other grades are indicated by plus and minus differentials. Thus, wrought iron and shafting take a $10 plus differential, while old tinplate bundles take a $10 minus differential. While generally there is no segregation of the separate grades in a barge, the defendant's own witness, a broker with 17 years' experience in the scrap business, testified that the price of each carload of scrap is different, and it differs according to the OPS schedule. Some 20 to 23 carloads of scrap, according to the defendant's exhibit, go into 1 barge to make a single bargeload. This broker has dealt with consumers over a considerable period of time. He has a composite worksheet for each bargeload, and upon the invoice which he sends to the customer are shown the details of the contents of the particular barge. The physical details of the method of doing business have significance in that they accent the further fact that the barge of scrap generally is not one homogeneous mass, as in the case of fungibles such as grain or sand, but is a scrambling of separately valued lots.

There appears no need for extended description of the many grades of scrap. However, several illustrative descriptions are set out in appendix A hereto. No. 1 steel, No. 2 steel, No. 1 bundles, No. 2 bundles, No. 1 busheling, and motor blocks are the grades which predominate in the bargeloads exhibited. It is repeatedly emphasized, however, that practically all loads of scrap by water are mixtures of various grades.

A bargeload of scrap may and often does consist of pieces or units varying greatly in size. Individual particles of scrap called turnings or borings, for example, are so small as to be virtually microscopic. The other extreme is illustrated by a "salamander," by which is meant a large mass of iron that solidifies in the bottom of a blast furnace when it is shut down for relining, possibly 6 feet, or more in its longest dimension, and weighing several tons. By reason of its heavy weight, it is generally loaded or unloaded by means of a sling, instead of a magnet.

Other examples of large individual pieces of scrap moved by water carriers are (1) scrap rails consisting of standard 33-foot rail in the original form, which are handled by slings composed of steel chains

[4] While these OPS (Office of Price Stabilization) prices are now obsolete, they had their origin in actual quotations in the trade, and apparently the approximate relationships of these prices of different grades still prevail.

and placed parallel in an orderly fashion in the hold; (2) large iron wheels, 15 feet in diameter; (3) ingot mold tops, 30 inches square and 22 inches deep, weighing 1,000 to 1,400 pounds apiece; (4) locomotive wheels and tires, some broken and some unbroken; and (5) rail-car axles, 88 inches long, some of which are cut up. Many other examples of scrap are illustrated. These illustrations serve to emphasize the mixed nature of virtually all bargeloads or boatloads in that they are composed of various shapes, sizes, and grades of scrap.

Vessels with scrap are generally loaded and unloaded by machinery and not by hand. Most of the scrap is lifted piece by piece, by crane and magnet, because of its large size. In some instances scrap is unloaded by use of a hand shovel, but apparently this occurs only where a magnet cannot reach a few pieces remaining by reason of the deck "overhang" or in scraping up the leavings littered on the floor, and is not typical of the general practice.

Stress is laid by the complainants upon the general practice, increasingly prevalent since 1936, of compressing relatively thin or porous scrap pieces into so-called bundles. These bundles vary in size, shape, and weight, and constitute a portion of most boatloads, although never a straight load. The bundles are not secured by wire, rope, or ties of any kind, and have no marks identifying them. The defendant points out that bundles frequently fall apart while handling to or from the barge, that a load of scrap is always a conglomerate or heterogeneous mass, and that every bit of the load is ultimately reduced to one common denominator, namely, liquid, flowing, molten metal. The purpose of compressing the bundles, according to the defendant, is solely to meet the requirements and demands of the steel manufacturers, their dimensions being set to meet the openings in the furnaces.

Scrap partakes of some of the characteristics of both bulk and nonbulk commodities. No comparison is made, however, with any other well-recognized bulk commodity whose variations in size and weight, absence of internal mobility, and lack of homogeneity, as between its many pieces, are as pronounced as in the case of scrap. Considerable reliance is placed, rather, upon excerpts from the legislative history of part III of the act. However, no reference is made to any expression in any congressional committee report or to any statement made on the floor of either House of the Congress when the bills which later became part III of the act were under discussion which throws any light upon the intended meaning of the words "in bulk" as used in section 303 (b). Reference is made to a Canadian act from which it appears that iron and steel scrap and pig iron were expressly named therein in a list of commodities as "goods in bulk."

What another Government has done in defining the term "in bulk" is, of course, not controlling here.

Custom in the water-carrier industry.—Not only does section 303 (b) expressly refer to the "existing custom of the trade," but this Commission and the courts have indicated that where words have a special commercial meaning commonly accepted in a trade or industry, as distinguishable from an ordinary, technical, or dictionary meaning, such special meaning as accepted by the industry must govern. See *United States* v. *Seatrain Lines*, 329 U. S. 424; *Black* v. *Interstate Commerce Commission*, 167 F. (2d) 825, affirmed 335 U. S. 818; and *Guyott Construction Co., Inc., Extension—Fuel Oil*, 49 M. C. C. 265. The words "in bulk" here are not mere dictionary words, but are words long used in transportation and in the scrap industry, and moreover, have been construed by the Commission as will presently appear. The meaning thus given to them should govern here unless strong reason to the contrary is shown.

In *Mulqueen Contract Carrier Application*, 250 I. C. C. 436, 439, decided August 5, 1942, division 4 said:

> The term "commodities in bulk" is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains. Pig iron is a processed or semimanufactured product and is of such size and weight that it cannot be poured, scooped, or shoveled. Pigs are often 1½ to 2 feet in length and weigh upwards of 100 pounds. They can be handled piece by piece. The foregoing statements apply with equal force to steel billets. We therefore conclude that pig iron and steel billets are not bulk commodities and their transportation is not exempt under section 303 (b), even though they be transported without wrappers or containers and without transportation mark or count.

Almost 14 years have passed since section 303 (b) was enacted, and nearly 12 years since the foregoing definition by the Commission of the words "in bulk" was announced. Ample time has thus been afforded the water carriers to conform their operations to the law as so interpreted. Apparently this has generally been done, for the evidence is positive that the only unregulated water carriers known to the complainants that have transported scrap are the two defendants. As stated the defendant Rose Barge Lines has abandoned such operation. Thus, Serodino is the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity, and the number of such shipments that it has transported is not shown. While a witness for the defendant testified that a number of exempt water carriers on the Mississippi and Ohio Rivers transport scrap from time to time, he failed to identify any such carrier by name. Six unregulated water carriers, interveners in support of the de-

fendant, have indicated their desire to engage in the transportation of scrap as an exempt commodity, if not forbidden by law to do so.

The gross business in steel scrap in this country in 1948 aggregated about $2 billion, and since then the volume apparently has increased. Much of the movement has been by water. Scrap as generally moved by water is readily recognized, as it usually moves in open-top barges at a slow speed of approximately 4 miles an hour upstream. On a trip from Chattanooga, Tenn., to Pittsburgh, for example, a bargeload would pass through about 50 locks, and under several bridges. The evidence is persuasive that very few exempt or unregulated water carriers have engaged in the interstate movement of scrap, and that water carriers generally have accepted and conformed to the definition of bulk commodities as announced by division 4 in 1942.

Reference is made to *John L. Goss Corp. Contract Carrier Application*, 250 I. C. C. 101, decided November 10, 1941, in which appears the following, at page 103:

> The term "in bulk" commonly refers to a loose mass which is poured or thrown into a vessel or vehicle without regard to order, and which is restrained during transportation only by the bottom and sides of the carrying vessel and its bulkheads.

Division 4 was there considering granite, which was carried by the applicant without transportation marks or counts, was not tallied by the applicant in its carrier operation, but was "stowed" in the vessel. It was found not to be a bulk commodity. In a report on reconsideration, 250 I. C. C. 485, decided September 14, 1942, Goss sought authority to transport scrap, showing that it had transported one shipment for its own account in September 1941. Division 4 found, however, that the applicant had not engaged in this transportation prior to January 1, 1940, and that the one isolated shipment in 1941 was not sufficient to justify authorization to transport scrap.

The interveners in support of the defendant rely also on the decision of division 4 in *Raike Applications*, 250 I. C. C. 177, decided January 30, 1942, prior to the *Mulqueen* case, *supra*. No objection to the applications was there made and no oral hearing was held. The applications were dismissed on the ground of the representations made that all of the applicant's operations were exempt under either section 303 (b) or section 303 (d) of the act. In the report therein scrap is specifically referred to only once, and there is no discussion whatever as to whether scrap is or is not in bulk.

In *Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, at page 668, division 4 said:

> *Commodities in bulk.*—The question next presented is which of the commodities transported by applicant are commodities in bulk within the meaning of section 303 (b). We have no doubt that ore, coal, grain, sulphur, and phosphate

rock, as they are customarily transported, are commodities in bulk within the meaning of section 303 (b).

Pig iron and billets are not commodities in bulk. We so found in *Mulqueen Contract Carrier Application*, 250 I. C. C. 436, and gave in full our reasons therefor. In that report we, in effect, established a test for determining whether a commodity is in bulk. We see no need for repeating what was there said.

The record is not sufficient for us to determine definitely whether such articles as spiegeleisen, ferromanganese, and commercial scrap are commodities in bulk within the meaning of section 303 (b). It is our general understanding, however, that the size and weight of the individual pieces of spiegeleisen and ferromanganese are comparable to the size and weight of pig iron. If that be true, then, in our opinion, these are not commodities in bulk within the meaning of section 303 (b) for the reasons fully set forth in our report in the *Mulqueen* case. It is our further understanding that commercial scrap such as transported by applicant is compressed, and in that form weighs several hundred pounds. If that be true, then, in our opinion, it also is not a commodity in bulk.

The defendant calls attention to the fact that there is no discussion in the latter report of the manner in which compressed scrap was received, handled, or transported. The instant record does show the facts in that respect; also that much scrap is now compressed, and that the average bundle weighs several hundred pounds. If a compressed bundle is not a commodity in bulk as was found in the last-mentioned proceeding, it is difficult to understand how, as a matter of law, a bargeload of scrap consisting in part of compressed bundles could be anything but nonbulk, since the inclusion of a commodity not in bulk in a shipment of an admittedly bulk commodity destroys the exemption.

The test of a commodity in bulk as defined in the *Mulqueen* case, *supra*, has been followed over a period of 11 years in other decisions listed in appendix B hereto.

A further contention is made by the interveners on behalf of the defendant that to find that scrap is not in bulk, and thereby as a consequence to bar its transportation by unregulated "bulk" water carriers, is violative of the national transportation policy. The thought seems to be that a finding that scrap is a nonbulk commodity would be destructive of or harmful to the unregulated water carriers. The facts do not bear out this contention. There are numerous bulk commodities, clearly in bulk, which the exempt carriers are free to carry unaffected by any finding herein. Moreover there is no substantial evidence that bulk carriers by water have ever regularly transported any substantial volume of scrap.

A further thought motivating this contention seems to be that it is more economical for bulk operators than for regulated carriers to transport scrap. The evidence is persuasive to the contrary. The defendant has charged the same rates for the transportation of scrap as the rates of common carriers by water.

General discussion and conclusions.—As generally transported by water, a shipment of scrap includes pieces varying greatly as to size,

shape, weight, and value. Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece. Scrap lacks such homogeneity as is known to exist in such commodities as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled.

While scrap as thus handled is loaded and carried without wrappers or containers and without transportation mark or count, much of it is in bundles or compressed in bales which must be handled piece by piece in a manner largely similar to shipments in wrappers or containers, and in a manner similar to pig iron and billets which have been found to be nonbulk commodities.

The marked contrast between commodities thus handled and commodities which can be poured, scooped, or shoveled is reasonably clear and distinct, and we are convinced furnishes a sound basis for a conclusion that scrap is properly characterized as falling within the category of nonbulk commodities.

We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in section 303 (b) of the act; that the defendant, Rose Barge Line, Inc., has ceased the transportation of scrap iron, and that the entry of an order against it is unnecessary; that the defendant, V. P. Scrodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap, in bargeloads, without a certificate or other form of authority required by part III of the act; and that this defendant should promptly cease and desist from such unauthorized transportation.

An appropriate order will be entered.

COMMISSIONER MITCHELL did not participate in the disposition of these proceedings.

APPENDIX A

Specifications for certain grades of scrap iron as taken from the OPS regulation (exhibit 3)

No. 1 railroad heavy melting steel. (A. A. R. No. 24.) Clean wrought iron or steel scrap ¼ inch and over in thickness, not over 18 inches in width, and not over 5 feet in length. Individual pieces must be free from attachments and cut so as to lie reasonably flat in charging box. May include new mashed pipe ends, original diameter 4 inches and over. No needle or skeleton plate, agricultural shapes, annealing pots, boiler tubes, grate bars, cast iron, malleable iron, or curly or unwieldy pieces will be accepted.

No. 1 busheling. (A. A. R. No. 10.) Clean wrought iron and/or steel ⅛ inch and over in thickness and/or pipe and/or flues not exceeding 12 inches in any

dimension. May not contain burnt material. Must be free from metal coated, lined or porcelain enameled stock.

No. 1 bundles. New black steel sheet scrap, clippings, or skeleton scrap, hydraulically compressed or hand bundled to charging box size and weighing not less than 75 pounds per cubic foot. (Hand bundles must also be tightly secured and stand handling with a magnet.) Must be free of paint or protective coating of any kind. May include Stanley Balls, or mandrel wound bundles or skeleton reels, tightly secured. May include chemically detinned material. No tin can well be deemed to be detinned unless it has undergone the chemical process for the removal and recovery of tin. May not include electrical sheets, or any material over 0.5% of silicon.

No. 2 bundles. Body and fender scrap, or old black and/or galvanized scrap, hydraulically compressed to charging box size and weighing not less than 72 pounds per cubic foot. May include galvanized, but not vitreous enameled stock, tin plate, terne plate, or other metal coated material. Painted or lacquered material shall not be considered as coated material. May include hydraulically compressed black or galvanized fence wire, light coil spring and any bundles which are excluded from No. 1 bundles by reason of their containing painted, lacquered, lithographed or galvanized material.

APPENDIX B

Specific commodities, found by the Commission to be bulk or nonbulk, as indicated

	Commission decision
Bulk commodity:	
Coal, iron ore, and sulphur.	*Saginaw Dock & Term. Co. Contract Carrier Application*, 260 I. C. C. 657, 663.
Sand, gravel and grains	*Mulqueen Contract Carrier Application*, 250 I. C. C. 436.
Soda ash	*Conners Marine Co., Inc., Contract Carrier Application*, 250 I. C. C. 381.
Salt and slag	*Portland Tug & Barge Co. Ext.—Washington-California*, 265 I. C. C. 325, 335.
Nonbulk commodity:	
Logs and piling	*Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, 529.
Lumber	*Foreman-Gregory Co.—Exemption, Section 303 (e)*, 250 I. C. C. 51, 52.
Oilfield machinery, tank steel, steel pipe, oil-drilling rigs, rice in sacks, sugarcane, sugar in bags, oil tanks, piling, engines, oil-well casing, and rocks (individually loaded).	*G. B. Zigler Co. Contract Carrier Application*, 265 I. C. C. 404, 406.
Pig iron and steel billets	*Mulqueen Contract Carrier Application*, 250 I. C. C. 436.
Spiegeleisen and ferromanganese.	*Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, 668.
Bricks	*Callanan Road Improvement Company Extension—Towage*, 285 I. C. C. 137.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 589

V. P. SERODINO, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF UNION BARGE LINE CORPORATION, MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, INLAND WATER CARRIERS FREIGHT ASSOCIATION, COLUMBIA TRANSPORTATION COMPANY, INC., AND GREAT LAKES SHIP OWNERS ASSOCIATION TO AFFIRM.

DONALD MACLEAY,
1625 K Street, N. W.,
Washington, D. C.,
Attorney for Inland Water Carriers Freight Association.

KENNETH J. MCAULIFFE,
233 Broadway,
New York, N. Y.,
Attorney for Columbia Transportation Company, Inc.

JOHN H. EISENHART, JR.,
1319 F Street, N. W.,
Washington, D. C.,
Attorney for Great Lakes Ship Owners Association.

HARRY C. AMES, JR.,
Transportation Building,
Washington, D. C.,
Attorney for American Barge Line Company and Mississippi Valley Barge Line Company.

JOHN S. MASON,
5th & Liberty Avenues,
Pittsburgh, Pa.

R. GRANVILLE CURRY,
FREDERICK M. DOLAN,
631 Southern Building,
Washington, D. C.,
Attorneys for Union Barge Line Corporation.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 589

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Union Barge Line Corporation, Mississippi Valley Barge Line Company, American Barge Line Company, Inland Water Carriers Freight Association, Columbia Transportation Company, Inc., and Great Lakes Ship Owners Association, intervening defendants, in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment entered on June 17, 1955, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1253, 1336, 2284, and 2325, dismissing appellant's complaint which sought to set aside an order of Division 4 of the Interstate Commerce Commission in *Union Barge Line Corp.* v. *Rose Barge Line, Inc.*, 292 I.C.C. 681, as affirmed by the entire Commission on petition for reconsideration. A motion by appellant for a new trial, filed June 16, 1955, was denied by order of the District Court on August 24, 1955, and notice of appeal was filed by appellant in that Court on October 24, 1955. Jurisdictional statement was filed on December 27, 1955.

STATEMENT OF ISSUES

Appellant challenges the construction by the Commission of the words "commodities in bulk" in section 303(b) of the Interstate Commerce Act (49 U.S.C. sec. 903(b)) contending that it erred in concluding that scrap iron as transported by appellant, admittedly "without wrappers or containers" and "without transportation mark or count" was not "a commodity in bulk", and was, therefore, not entitled to exemption under this section*

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* Section 303(b) provides: "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

The question thus presented is whether the Commission was justified, upon the facts in the case, in so construing the statute. After full opportunity to be heard, the question raised by appellant was determined adversely to it (1) by the Hearing Examiner who heard the case before the Commission, (2) by Division 4 of the Commission, (3) by the entire Commission in denying a petition for reconsideration, and (4) by the lower Court.

The case before the Commission arose upon complaints of appellees Union Barge Line Corporation, Mississippi Valley Barge Line Company, and American Barge Line Company. The other appellees joining in this motion, Inland Water Carriers Freight Association, Columbia Transportation Company, Inc., and Great Lakes Ship Owners Association intervened in support of complainants. Railroads in eastern territory also intervened in support of complainants. The complaints were brought under section 304(e) of the Interstate Commerce Act (49 U.S.C. sec. 904) which authorizes the Commission, upon complaint, to "investigate whether any water carrier has failed to comply with any provision of this part [Part III relating to water carriers] or with any requirement established pursuant thereto" and in case it finds failure to comply, to issue "an appropriate order to compel such carrier to comply therewith".

The complaints alleged that transportation by V. P. Serodino, Inc., appellant here, and Rose Barge Line, Inc., of scrap iron by water in towed barges on the Tennessee and Ohio rivers, without appropriate authority from the Commission by certificate or permit, was the transportation of a commodity which could not properly be termed a commodity "in bulk" within the exemption provided in section 303(b) of the Act, and that the transportation was, therefore, unlawful. Complainants prayed that the Commission pursuant to authority under section 304(e) enter an order requiring discontinuance of such unlawful transportation.

Rose Barge Line, Inc., did not contest the case, and discontinued the operation complained of. Appellant defended, making substantially the same contentions that it makes here. These, as stated, were found by the Commission and the lower Court to be unsound.

QUESTIONS RAISED BY APPELLANT ARE WITHOUT SUBSTANCE

Rule 16 of the rules of this Court provides for receiving "a motion to affirm the judgment" of a lower Court "on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

There is, it is believed, utter lack of such substantiality in the questions raised by appellant in the present case, for the following reasons, among others.

(a) The Commission's Own Report Deals With and Shows the Unsubstantial Character of Appellant's Contentions.

The Commission discussed in its report the meaning of "commodities in bulk" in section 303(b), in the light of the facts presented, its previous decisions, and the long existing practice in the industry of treating scrap iron as a commodity not "in bulk" within the meaning of section 303(b) and, therefore, not entitled to exemption under that section. "Serodino", the Commission said, "is the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity" (p. 688).

The Commission found as to the traffic involved that there were wide variations in the pieces of scrap "as to size, shape, weight, and value", that "Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece",

that "Scrap lacks such homogeneity as is known to exist in such commodities [in bulk] as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled" (pp. 690, 691). Appellant's bargeload shipments, it said, were composed of carloads of different types and grades of scrap having different values (pp. 685, 686) and "the barge of scrap generally is not one homogeneous mass" but "is a scrambling of separately valued lots" (p. 686).

The Commission pointed out that the first sentence in section 303(b) contains the requirement that commodities to be exempted must be "in bulk"; that this requirement must first be met before any question can arise as to the later provisions with respect to transportation "without wrappers or containers" and "without transportation mark or count", the latter phrases being those not defining "commodities in bulk", but merely words of limitation where commodities in bulk are first shown to exist. The Commission found that for at least twelve of the fourteen years since section 303(b) was enacted, prior to the decision in this case, such construction had been followed by the Commission and had been adhered to by water carriers generally (p. 688). The Commission further found (p. 691):

> "While scrap as thus handled is loaded and carried without wrappers or containers and without transportation mark or count, much of it is in bundles or compressed in bales which must be handled piece by piece in a manner largely similar to shipments in wrappers or containers, and in a manner similar to pig iron and billets which have been found to be nonbulk commodities.
>
> The marked contrast between commodities thus handled and commodities which can be poured, scooped, or shoveled is reasonably clear and distinct, and we are convinced furnishes a sound basis for a conclusion that scrap is properly characterized as falling within the category of nonbulk commodities.

> We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation 'in bulk' within the meaning of those words in section 303(b) of the act;"

The Commission, therefore, entered its order requiring appellant to cease and desist from the practice thus found to be unlawful.

This decision of the Commission was upheld by the lower Court upon recitation of basic findings of the Commission. The Court apparently did not regard appellant's attack upon those findings as sufficiently substantial to warrant the writing of an opinion. Lack of substantiality is also indicated by the fact that the only other defendant in the case before the Commission, Rose Barge Line, Inc., did not contest the decision and ceased the operation complained of. Four non-regulated carriers which intervened in support of appellant in the Commission proceeding but which made no showing of handling scrap iron have not attempted to contest the Commission's ruling in Court.

Where as here the Commission's determination requires consideration of both facts and law, in the background of its broad responsibilities under the Interstate Commerce Act and the National Transportation Policy, its findings and conclusions clearly should not be disturbed unless "in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion". *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946). No such showing has been made by appellant. Appropriate here is the language of this Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236 (1945), a water carrier public convenience and necessity case:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted

with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65 S. Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies."

The Commission has acted in accordance with statutory standards in the present case and no substantial basis has been shown for holding that its action is invalid.

(b) The Commission's Decision is Clearly in Accord With Its Long Existing Construction of the Statute and Acceptance Thereof by the Water Carrier Industry. Appellant is a Sole Exception.

Long existing construction of section 303(b) by the Commission clearly confirms the decision here involved. Since the enactment of the water carrier provisions of the Act in the latter part of 1940, the Commission has decided numerous cases involving the question of exemption of transportation of "commodities in bulk" under section 303(b). From the beginning the decisions of the Commission show that "commodities in bulk" have characteristics and qualities which are fundamentally different from those of scrap iron. The leading case, *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, was decided in August, 1942, nearly twelve years prior to the decision in the present case and only two years after enactment of section 303(b). The Commission's construction of the Act in that case has been followed since that time. There the Commission said (p. 439):

"The term 'commodities in bulk' is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains. Pig iron is a processed or semimanufactured product and is of such size and weight

that it cannot be poured, scooped, or shoveled. Pigs are often 1½ to 2 feet in length and weigh upwards of 100 pounds. They can be handled piece by piece. The foregoing statements apply with equal force to steel billets. We therefore conclude that pig iron and steel billets are not bulk commodities and their transportation is not exempt under section 303(b), even though they be transported without wrappers or containers and without transportation mark or count."

This construction of section 303(b) which is in substance the construction which the Commission relies upon in the present case, was not only uniformly followed by the Commission over a period of nearly twelve years but it has been accepted and conformed to by the water carrier industry, with the known exception only of appellant here (p. 688), which began operation in transporting scrap iron in 1952 about ten years after that decision (p. 685).

Great weight is to be accorded the long standing administrative interpretation of the statute by the Commission charged with its enforcement. See *New York, N. H. & H. R. Co.* v. *Interstate Commerce Com.*, 200 U. S. 361, 401 (1906); *Fawcus Mach. Co.* v *United States*, 282 U. S. 375, 378 (1931); *National Labor Rel. Bd.* v. *Denver Bldg. & Const. Tr. Co.*, 341 U. S. 675, 692 (1951); and *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932). Although section 303 has been amended since the *Mulqueen* decision, there was no attempt to change or modify the provisions of subsection (b) (Amendment June 12, 1948, C. 457, sec. 1, 62 Stat. 386). The failure of Congress to alter the section, notwithstanding the consistent construction by the agency charged with its enforcement "creates a presumption in favor of the administrative interpretation" which is another circumstance entitled to "great weight" in upholding the Commission's interpretation here. *Costanzo* v. *Tillinghast, supra*, p. 345.

Appellant in its Jurisdictional Statement (p. 6) contends that a different interpretation was made by the

Commission prior to the *Mulqueen* case in *John L. Goss Corp., Contract Carrier Application,* 250 I.C.C. 101 (1941) and *Raike Applications,* 250 I.C.C. 177 (1942). In the *Goss case,* the Commission found that although the granite there involved was carried without transportation mark or count it was nevertheless a commodity not in bulk. The decision was thus consistent with the later *Mulqueen case.* On reconsideration (250 I.C.C. 485; September 14, 1942), the Commission was asked to grant authority under the "grandfather" clause to Goss to transport "scrap iron" but such authority was denied because the carrier had made only one shipment in the critical period. It thus in effect held that scrap iron was subject to the Act, for otherwise, if exempt, there was no need of a certificate or permit. As to the *Raike case,* there was no hearing, no contest, no discussion of what constitutes an exempt commodity in bulk, and a mere incidental reference to scrap iron with certain other commodities. Neither the *Goss case* nor the *Raike case* is of any significance here.

Appellant also contends in its Jurisdictional Statement (p. 6) that an administrative ruling, made in 1941, is inconsistent with the present interpretation of section 303 (b). That ruling shows on its face that it was a ruling of the Commission's "Bureau of Water Carriers" and was not the ruling of the Commission itself. However, the ruling is consistent with the *Mulqueen case,* because "pipe" is found to be not a commodity in bulk, even though transported without wrappers or containers.*

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* The question and answer in the ruling are, as follows:

"Question No. 1:

Is pipe, not packaged or bundled, a 'commodity in bulk'?

Answer:

No. A 'commodity in bulk' is one that is not sacked, boxed, bundled, or otherwise assembled but is carried loose and is transported in the vessel without stowage except necessary separation, or necessary trimming or securing to promote the safety of the vessel and cargo. Pipe is not such a commodity."

Appellant also endeavors to minimize the decision in the *Mulqueen case,* pointing out that it has been cited in only two water carrier cases besides the present one (p. 6). Those two cases clearly reaffirm the principles established in the *Mulqueen case. Columbia Transp. Co. Contract Carrier Application,* 250 I.C.C. 653, 668 (1943), holding scrap iron compressed in bundles to be non-exempt, and *Towage of Floating Objects (Logs and Piling in Rafts),* 250 I.C.C. 525, 529 (1942). That it was not cited in some of the other numerous decisions involving the question of "commodities in bulk" does not mean that it was not followed. The contrary is true (p. 688).

(c) The Commission Has Not Departed From Dictionary Definitions of Commodities "in Bulk" But Has Properly Construed the Words in the Context of the Statute and Its Purpose.

Appellant in its Jurisdictional Statement argues (p. 4) that the Commission erroneously "decided that the words 'in bulk' do not carry their dictionary meaning as they are used in 903(b)". This is a misconception.

In the lower Court appellant relied on the definition in Webster's New International Dictionary of "in bulk": "In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold in bulk." The Commission in the present case said (p. 688) "The words 'in bulk' here are not mere dictionary words, but are words long used in transportation and in the scrap industry, and moreover, have been construed by the Commission * * *".

As to the dictionary definition, the words "in mass" indicate a condition in which no portion of the whole can be clearly distinguished from any other portion, as, for example, liquids, sand, gravel, and coal. Moreover, the words in the definition "divided into parts" and "any desired quantity may be removed" indicate that all must

be the same commodity, completely interchangeable, homogeneous, of uniform value, and with no portion clearly distinguishable from any other portion.

This is not the situation as to scrap iron here involved. The Commission, in concluding that scrap iron is not a commodity in bulk within the meaning of section 303(b) pointed out that, as generally transported by water, scrap iron includes "pieces varying greatly as to size, shape, weight, and value" (pp. 690-691), that "Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece", that "Scrap lacks such homogeneity as is known to exist in such commodities [in bulk] as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled" (p. 691). Some of the large individual pieces of scrap, the Commission found, include "scrap rails", "large iron wheels", "ingot mold tops", (pp. 686-687) and "motor blocks" (p. 686); also scrap compressed in large bales (p. 691). The wide variation in shape and sizes and the general physical character of the bargeload are clearly inconsistent with an "in bulk" classification.

It is manifest, for example, that "motor blocks", which were included in a number of appellant's shipments (Ex. No. 23), and axles of automobiles and steel rails could not reasonably be regarded as commodities "in bulk" within the meaning of section 303(b). Appellant's own witness was definitely stumped when questioned by the Examiner as to whether steel rails could be considered as "in bulk" (R. 293).

The Commission further pointed out that appellant's bargeload shipments, although loaded together, were composed of clearly identifiable carloads of different types and grades of scrap having different values (p. 685-686). Thus the shipments here under consideration were far

from being those of a single commodity "in bulk" but included a loading together of separate lots of widely varying types and values of scrap, with different melting characteristics and of such character that at destination the different types and grades of scrap could be separated at time of use. In referring to the different grades and value, the Commission said that this circumstance further emphasizes the fact "that the barge of scrap generally is not one homogeneous mass, as in the case of fungibles such as grain or sand, but is a scrambling of separately valued lots" (p. 686).

In numerous cases, including those cited by the Commission in Appendix B to its decision (p. 692), the Commission has found that commodities such as the following are commodities in bulk within the exemption of section 303(b) of the Act:*

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* *McCarren Towing Line, Inc.*, 250 I.C.C. 168, 169 (1942) (coal); *Great Lakes Towing Co.*, 250 I.C.C. 531, 536 (1942) (coal); *James McWilliams Blue Line, Inc.*, 260 I.C.C. 15, 17 (1943) (coal, coke, and sand); *Blaske Lines*, 260 I.C.C. 515, 517 (1945) (coal, sand, gravel, and cement); *Arrow Tug & Barge Co.*, 265 I.C.C. 129, 138 (1947) (coal, limerock, and sulphur); *Saginaw Dock & Term. Co.*, 260 I.C.C. 657, 663 (1945) (coal, iron ore, and sulphur); *Union Sand & Gravel Co.*, 250 I.C.C. 141, 142 (1942) (sand and gravel); *Wood Towing Corp.*, 250 I.C.C. 170, 171 (1942) (sand and gravel); *Kahlke*, 250 I.C.C. 197, 199 (1942) (sand, gravel, and stone); *Mulqueen*, 250 I.C.C. 436, 439, (1942) (coal, ore, sand, gravel, and grains); *G. B. Zigler Co.*, 265 I. C. C. 265, 269 (1947) (sand); *Lester F. Alexander Co.*, 250 I.C.C. 463, 466 (1942) (shells, sand, and gravel); *Erie & St. Lawrence Corp.*, 250 I.C.C. 767, 772 (1943) (phosphate rock, sulphur, grain, and ore); *Conners Marine Co., Inc.*, 250 I.C.C. 381, 385 (1942) (molasses and soda ash); *Portland Tug & Barge Co.*, 265 I.C.C. 325, 335, (1948) (salt, slag, and ores); *Bronx Towing Line, Inc.*, 250 I.C.C. 614, 615 (1943) (mud, sand, and crushed stone).

Coal	Grains
Iron Ore	Soda Ash
Sulphur	Salt
Sand	Slag
Gravel	Mud
Shells	Molasses
Phosphate Rock	Cement

Comparison of such commodities, as both the Commission and the lower Court found, shows that scrap iron is clearly different in its characteristics from those commodities and that it was manifestly proper for the Commission to classify scrap iron as a commodity not in bulk under section 303(b) of the Act.

The Commission's conclusion is further strengthened by comparison with numerous commodities found not to be in bulk including those referred to in Appendix B to the report at page 692. Some of these are as follows:*

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* *Towage of Floating Objects*, 250 I.C.C. 525, 529 (1942) (logs and piling in rafts); *Boston Tow Boat Co.*, 250 I.C.C. 743, 744 (1943) (Christmas trees, lumber, newsprint paper, monumental stone, and pipe); *G. B. Zigler Co.*, 265 I.C.C. 404, 406 (1948) (oil-field machinery, tanks, steel, steel pipe, oil-drilling rigs, logs, sugar cane, oil tanks, piling, and rocks, individually loaded); *Mulqueen*, 250 I.C.C. 436, 439 (1942) (pig iron, steel billets); *Foreman-Gregory Co.*, 250 I.C.C. 51, 52 (1941) (lumber); *Columbia Transp. Co.*, 250 I.C.C. 653, 668 (1943) (spiegeleisen, ferro-manganese, pig iron, billets, scrap iron, compressed in bundles); *J. L. Goss Corp.*, 250 I.C.C. 485, 487 (1942) (scrap iron); *Ohio River Co.*, 260 I.C.C. 501, 505, 506 (1945) (scrap iron); *Blaske Lines*, 260 I.C.C. 515, 517 (1945) (scrap iron in compressed bundles); *Commercial Barge Lines, Inc.*, 260 I.C.C. 555, 557 (1945) (scrap iron); *Shamrock Towing Co., Inc.*, 250 I.C.C. 788, 789 (1943) (bricks); *Callanan Road Improvement Company*, 285 I.C.C. 137, (1952) (bricks).

Logs	Steel tanks
Piling	Oil-drilling rigs
Christmas trees	Sugar cane
Lumber	Oil tanks
Newsprint paper	Rocks individually loaded
Monumental stone	Pig iron
Pipe	Steel billets
Spiegeleisen	Scrap iron, and scrap iron compressed in bundles
Ferro-Manganese	
Oil-field machinery	Bricks

Appellant seeks to distinguish the cases cited by the Commission in its report on the theory that in some instances the transportation was with "transportation mark or count". This is a mistaken theory. The decisions generally contain no reference to transportation mark or count as a factor in respect to the above commodities. Transportation of pipe by weight or of lumber by volume measured in cubic feet does not mean with "transportation mark or count". The general practice of handling traffic by weight is inconsistent with appellant's claims.*

The Commission's construction of section 303(b) is clearly in accord with the statutory purpose "to provide

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* Note that Senator Wheeler who was in charge of the bill which resulted in the 1940 amendment was questioned as to what was meant by "commodities loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." Senator Burke inquired (86 Cong. Rec. 11765):

> "For instance, commodities such as sand, gravel, coal, salt, various ores, sulfur, crushed stone, and so forth. They are shipped in bulk without wrappers or containers, but necessarily in the shipping document they are measured by weight or by volume; but that fact would not take away the exemption?"

Senator Wheeler replied:

> "No, indeed. * * * They are exempt, because it is recognized that there is not any competition at all with reference to those materials."

for regulation of the rates and services of competing water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities". *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 637 (1944).

An unregulated carrier, such as appellant claims to be, is not subject to the statutory prohibitions against secret rates, discriminations in rates and services, and unnecessary and duplicative services or unfair or destructive practices. To construe the statute as appellant contends would be clearly contrary to the letter of the law and would "frustrate the purpose of Congress". *Cornell Steamboat Co.* v. *United States,* supra, p. 637.

As in *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549 (1940), the Commission's interpretation is entitled to great weight where it involves " 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new' ". In that case the word "employees" was held to be restricted to those whose activities "affect the safety of operation". The Court held that it was proper to resort to the purpose of the statute, rather than the "literal words" if the words would produce an "unreasonable" result "plainly at variance with the policy of the legislation" (p. 543).

The Commission's construction is also in accord with the rule that exemptions are to be strictly construed. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Com'n,* 286 U. S. 299 (1932). There the Court held against a contention that the carrier involved was "an interurban railway", in view of the purpose of the statute rather than the meaning to be drawn "from mere dictionary definitions of the words employed by Congress".

The construction of the statute in the present case is plainly correct.

(d) The Commission's Construction of the Statute is Clearly Supported by the Legislative History of the Water Carrier Provisions of the Act.

The conference report on the bill which resulted in the 1940 amendment adding the water carrier provisions to the Interstate Commerce Act pointed out, "This legislation is a forward and fostering step for water transportation as well as the national transportation * * *". The Commission, it said, would have the "duty, to protect and foster water transportation and preserve its inherent advantages" (Report No. 2832, House of Representatives. 76th Cong., 3d Session, p. 88).

The history of the legislation indicates that the general purpose of the water carrier exemption was to permit exclusion where competition with regulated carriers would not be present. The general purpose appears in other exemption provisions of section 303, as for example paragraphs (e) and (g). Note Commissioner Joseph B. Eastman's letter to the Chairman of the House Committee on Interstate and Foreign Commerce, dated March 20, 1939 (reprinted in House hearings on H. R. 2531 and H. R. 4862, 76th Cong., 1st Sess., pp. 1557, 1560), stating that "contract carriers, such as those which carry iron ore, coal, and grain in bulk on the Great Lakes, which are practically noncompetitive with common carriers * * * could be relieved from regulation without harm." A similar purpose was indicated by Senator Wheeler, who was in charge of the bill, (86 Cong. Rec. 11765), and by Mr. Halleck in the House of Representatives (84 Cong. Rec. 9980 (1939)).

The commodities referred to as "in bulk" were such commodities as coal, grain, stone, and ore, which, as the Commission points out in the present case, are fundamentally different from the non-bulk commodity, scrap iron, here involved. Water carriers and rail carriers are in keen competition in the transportation of scrap iron.

The Commission is clearly supported by the legislative history of the statute involved.

In view of the foregoing the above-mentioned appellees respectfully submit that appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

DONALD MACLEAY,
1625 K Street, N. W.,
Washington, D. C.,
Attorney for Inland Water Carriers Freight Association.

KENNETH J. MCAULIFFE,
233 Broadway,
New York, N. Y.,
Attorney for Columbia Transportation Company, Inc.

JOHN H. EISENHART, JR.,
1319 F Street, N. W.,
Washington, D. C.,
Attorney for Great Lakes Ship Owners Association.

HARRY C. AMES, JR.,
Transportation Building,
Washington, D. C.,
Attorney for American Barge Line Company and Mississippi Valley Barge Line Company.

JOHN S. MASON,
5th & Liberty Avenues,
Pittsburgh, Pa.

R. GRANVILLE CURRY,
FREDERICK M. DOLAN,
631 Southern Building,
Washington, D. C.,
Attorneys for Union Barge Line Corporation.

January 20, 1956

PROOF OF SERVICE

I hereby certify that on the 20th day of January, 1956, copies of the foregoing document have been served in the following manner:

(1) On the attorneys for appellant by mailing copies addressed with air-mail postage prepaid to:

John S. Burchmore, 2106 Field Building, Chicago, Ill.,
Robert N. Burchmore, 2106 Field Building, Chicago, Ill.

(2) On the United States by mailing copies duly addressed with first-class postage prepaid to:

Simon E. Sobeloff, Solicitor General, Department of Justice, Washington, D. C.,

Daniel M. Friedman, Assistant Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D. C.

(3) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to:

Robert W. Ginnane, Chief Counsel, Interstate Commerce Commission, Washington, D. C.

H. Neil Garson, Attorney, Interstate Commerce Commission, Washington, D. C.

(4) On the Eastern Railroads by mailing a copy duly addressed with first-class postage prepaid to:

Lewin W. Wickes, Pennsylvania Railroad, Suburban Station Building, Philadelphia, Pa.

R. GRANVILLE CURRY,
of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 589

V. P. SERODINO, INC., APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on June 17, 1955, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order required appellant to cease and de-

sist from engaging in interstate transportation by water of iron and steel scrap without the certificate or other form of authority required by Section 309 of the Interstate Commerce Act, 49 U. S. C. 909. The order was predicated upon the Commission's finding that scrap is not a commodity transported "in bulk" within the meaning of the exemption provisions of Section 303(b) of the Act, 49 U. S. C. 903(b).

Three certificated common carriers initiated the Commission proceeding by filing a complaint alleging that appellant and Rose Barge Line, Inc.,[1] were engaged in transporting scrap iron by water without having requisite authority from the Commission (J. S. 1 B). Two other certificated water carriers, three associations of water carriers, and railroads operating in eastern territory intervened in support of the complaint (J. S. 2A). Several unregulated water carriers intervened in support of the defendants but introduced no evidence (J. S. 2B).

The examiner who heard the evidence concluded that appellant's transportation of scrap was not given exemption by Section 303(b) (J. S. 3A). Division 4 of the Commission also found that scrap was not a commodity transported "in bulk" (J. S. 1B-11B), and the full Commission denied recon-

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[1] Rose Barge Line, Inc., had towed scrap for appellant between August 15, 1952 and February 1953, but had not subsequently transported any scrap (J.S. 2B). The Commission found it unnecessary to issue any order against this defendant (J.S. 11B) and it is not a party to the present appeal.

sideration. The three-judge district court unanimously held the Commission's order valid.[2]

The Commission found the following facts, among others:

Appellant has been engaged in transporting scrap iron in open-top barges on the Ohio and Tennessee Rivers since January 1952. Scrap is shipped by rail from the many towns and cities where waste metal accumulates and incoming carloads are consolidated at various ports into bargeloads for movement to the consignee steel mills. Nearly all of the scrap so transported has been cut, sheared, or compressed into pieces, strips, or bundles, in order to segregate different grades having different prices and values (J.S. 5B).

A bargeload is composed of scrap of "various shapes, sizes, and grades" and most of the scrap, because of its large size, is loaded and unloaded piece by piece, by crane and magnet. Scrap moved by water includes such diverse items as 33-foot steel rails, iron wheels 15 feet in diameter, ingot mold tops weighing 1,000 to 1,400 pounds apiece, locomotive wheels, and rail-car axles 88 inches long (J. S. 6B-7B).

Regulations issued by the Office of Price Stabilization specified some 35 grades of scrap of dealer and industrial origin, and 35 other grades of railroad origin. While the separate grades are generally not segregated in the barge, appellant's

[2] The court filed findings of fact and conclusions of law (J.S. 1A-6A) but did not render an opinion.

broker prepares a worksheet for each bargeload and sends the customer an invoice showing its contents. These and other facts show that a "barge of scrap generally is not one homogenous mass," but constitutes "separately valued lots" (J. S. 6B).

The country's gross steel-scrap business was about $2,000,000,000 in 1948, and much of the movement was by water, but there has been only negligible water carriage on the basis that Section 303(b) exempts such carriage from regulation (J.S. 9B). Appellant is "the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity," and the amount which it has transported was not shown (J. S. 8B).

ARGUMENT

Section 303(b) provides in pertinent part that the water carrier provisions of Part III of the Interstate Commerce Act shall not apply to commodities transported "in bulk", but that this exemption shall apply only to commodities in bulk which are, in accordance with the custom of the trade existing as of June 1, 1939, carried without "wrappers or containers" and without "transportation mark or count."

We submit that the Commission's interpretation of this section in the instant case is clearly correct. It accords with the consistent administrative construction of the section since shortly after its enactment. Such "contemporaneous construction of a statute" by the agency "charged with the responsibility of setting its machinery in motion" is

entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

In *Mulqueen Contract Carriers Application*, 250 I. C. C. 436, 438, decided in 1942, less than two years after enactment of the water carrier provisions of Part III, the Commission ruled that the phrase "commodities in bulk" applies to those "which can be poured, scooped, or shoveled", and that it does not apply to items of such size and weight that they have to be handled piece by piece. The Commission also ruled that transportation in bulk was the "determinative factor", and that a commodity is not transported in bulk merely because it is carried without wrapper or container and without transportation mark or count.

In *Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, 668 (1943), the record was found to be insufficient to permit determination of the status of scrap under Section 303(b), but the Commission reaffirmed the tests which it had applied in the *Mulqueen* case, and declared that if the scrap which was transported was compressed, and weighed in that form several hundred pounds, it "is not a commodity in bulk." A like ruling was made in *Ohio River Co. Contract Carrier Application*, 260 I. C. C. 501, 505 (1945).

The consistency of the Commission's rulings is shown by the fact that it has classified coal, sand and gravel, grains, iron ore, sulphur, soda ash, salt, and slag, as bulk commodities, and has classified as nonbulk pig iron and steel billets, and numerous processed or semiprocessed articles (J. S. 12B).

Appellant refers to *John L. Goss Corp. Contract*

Carrier Application, 250 I. C. C. 101 (1941) and *Ralph Raike Applications,* 250 I. C. C. 177 (1942) as being not in accord with the *Mulqueen* ruling (J. S. 6). But the *Goss* ruling plainly involves no such divergence, and the *Raike* ruling was made in applications to which there was no objection and on which there was no oral hearing, and the only reference to scrap iron was in listing it, along with six other commodities, as within the 303(b) exemption.

Congress enacted Section 303(b) because of its understanding that the low cost of water transportation of bulk commodities made this transportation not competitive with other rail or water operations, and that there was therefore no reason to subject it to possibly burdensome regulation; and in the hearings and debates, the commodities referred to as those which would come within the exemption were coal, grain, iron ore, and limestone, and other commodities composed of fungible units and which form a conglomerate mass when stored or carried in the holds of vessels.[3] Accordingly, the Commission's ruling that scrap iron is not a bulk commodity within the meaning of Section 303(b) squarely accords with the meaning

[3] Letter of former Commissioner Eastman to Chairman of House Interstate and Foreign Commerce Committee (Hearings on H.R. 2531 and H.R. 4862, 76th Cong., 1st Sess., pp. 1557, 1560); statements of counsel for Lake Carriers Assn., chief proponent for the Section 303(b) exemption (Hearings on S. 2009, 76th Cong., 1st Sess., pp. 491, 494, 497); H. Rep. 1217, 76th Cong., 1st Sess., p. 3; 84 Cong. Rec. 5870, 5885, 6132, 9750-1, 9980.

of the section as shown by its legislative history. In addition, the Commission's findings and order are in accord with the practices of the industry—there has been practically no water carriage of scrap iron upon the basis that it is a bulk commodity exempt from regulation (*supra*, p. 4).

Appellant's sole contention, apart from denying the existence of consistent administrative construction of Section 303(b), is that the Commission's interpretation constitutes a rejection of the "dictionary meaning" and the "natural and common import" of the words "in bulk" (J. S. 4, 6). But the factual premise for this contention is appellant's statement, made without supporting citation, that scrap is "heaped loose" in the barges which transport it (*ibid.*). This factual premise is, we submit, contrary to the Commission's findings and the established facts. Most of the scrap transported by barge is compressed in bundles of large size and weight, it is loaded and unloaded piece by piece, and it includes individual items of widely diverse shapes and sizes (*supra*, p. 3). Patently it is not and cannot be "heaped loose" into the holds of the transporting barges.

While questions of statutory interpretation are for the courts to resolve, "giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute", where the question is "one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially", the determination made by the agency

"is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-131. We submit that in the present case the determination made by the Interstate Commerce Commission unquestionably has "warrant in the record" and "a reasonable basis in law."

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Attorney,
Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

V. P. SERODINO, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., TO AFFIRM

JAMES H. MCGLOTHLIN
Covington & Burling
701 Union Trust Building
Washington 5, D. C.

JOHN W. HUDSON
Taft, Stettinius and Hollister
603 Dixie Terminal Building
Cincinnati 2, Ohio

LEWIN W. WICKES
1740 Suburban Station Building
Philadelphia 4, Pennsylvania

Counsel for Rail Carrier Appellees

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Pursuant to Rule 16 of this Court, the rail carrier appellees who intervened as defendants* in the District Court move that the judgment sought to be reviewed be affirmed on the ground that the questions

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* The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Erie Railroad Company, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Pittsburgh & Lake Erie Railroad Company, The Pittsburgh & Shawmut Railroad Company, Pittsburgh & West Virginia Railway Company, and Western Maryland Railway Company.

on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTION

These appellees have examined the Motion of Union Barge Line Corporation, et al., to Affirm, and concur and join therein. The regulated carriers, rail and water, would be adversely affected by the extension of unregulated transportation in interstate commerce that appellant seeks.

NO SUBSTANTIAL QUESTION IS PRESENTED

The question on which decision of the cause depends is whether the transportation of scrap iron and steel in barges is transportation "of commodities in bulk" within the meaning of Section 303(b) of the Interstate Commerce Act [49 U.S.C. 903(b)]. That subsection exempts from regulation "transportation by a water carrier of commodities in bulk". The Interstate Commerce Commission, on a lengthy record and after full discussion in its report, held that scrap iron and steel is not a "commodity in bulk" within the meaning of the exemption. The Court below affirmed without opinion. The Commission found on this record that scrap iron and steel shipments consist of individual pieces that vary greatly as to size, shape, weight, and value, and that most of the pieces must be handled separately. The Commission distinguished these commodities from homogeneous bulk commodities, such as grain, coal, and sand, that can be scooped or shoveled, and of which any part of a shipment is precisely like every other part, as is readily visualized in the case of liquid bulk commodities.

Appellant relies heavily on the sentence of Section 303(b): "This subsection shall apply only in the case

of commodities in bulk which are . . . loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." In context, this sentence does not change or define the phrase "commodities in bulk". Commodities like grain that may be transported in bulk may also be packaged in "wrappers or containers" (such as bags) and handled subject to "transportation mark or count". The sentence quoted simply means that under such circumstances the transportation is not "of commodities in bulk". It does not mean that merely because commodities are not packaged for transportation (for instance, logs, lumber, monumental stone), they are automatically "commodities in bulk".

No substantial question for the decision of the Supreme Court is presented, and the judgment of the District Court should be affirmed without argument.

Respectfully submitted,

JAMES H. MCGLOTHLIN
Covington & Burling
701 Union Trust Building
Washington 5, D. C.

JOHN W. HUDSON
Taft, Stettinius and Hollister
603 Dixie Terminal Building
Cincinnati 2, Ohio

LEWIN W. WICKES
1740 Suburban Station
Building
Philadelphia 4, Pennsylvania

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY OF APPELLANT TO MOTIONS TO AFFIRM

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellant.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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REPLY OF APPELLANT TO MOTIONS TO AFFIRM

Serodino respectfully urges that this Court should deny the several motions to affirm as submitted by the government, the railroads and the barge line interests. Appellees assert that the question presented is unsubstantial. Appellant submits that there is a lack of substance, not in the question presented by this appeal, but in the basis for the commission's interpretation of the statute.

We undertake to show that the involved statute expresses a simple exemption in clear and unmistakable terms. The commission's interpretation of it is based on complex and

contradictory distractions, and upon prolonged discussion of matters that are not pertinent to the law as written by Congress. This interpretation was formally approved by the court below without further illumination.

Great respect and weight are due and accorded to the commission's views. The burden of sustaining a contrary view is therefore greater than would attach to an objective discussion of the merits of the question presented. If the time and opportunity afforded by this reply are inadequate to that burden, we pray that plenary consideration be granted to the end that appellant may not be denied a perfect understanding. In so doing, we respectfully suggest that the question presented, being narrow, warrants assignment of the cause to the summary calendar.

I.

THE COMMISSION REJECTED THE WORDS OF THE STATUTE AND SUBSTITUTED THEREFOR WORDS OF A DIFFERENT MEANING.

The basic question in this case is a narrow one. Appellees agree that the case turns on the meaning of the words "transportation of commodities in bulk" as used in 49 U.S.C. 903(b)[1] (U.S. p. 2; R.R. p. 2; Barge p. 2). They

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[1]"Sec. 303(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

have admitted that scrap iron and steel is a commodity but deny that it is or can be transported in bulk. (U.S. Answer par. VI; I.C.C. Answer par. V)

Appellees cannot and do not claim that the words "in bulk" or the phrase "commodities in bulk" are words of art having a precise technical meaning in a particular field.[2] Therefore, the words carry their natural and common import as familiar English words. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618 (1944).

The natural, common import of the words "in bulk" is clearly stated in Webster's New International Dictionary, where the word "bulk" receives comprehensive definition and the term "in bulk" is defined as follows:

> In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold *in bulk.*

The commission rejected the ordinary meaning of the words used by Congress saying, "The words 'in bulk' here are not mere dictionary words, but are words long used

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[2]The commission's report writer suggested (292 I.C.C. 688) that the words "in bulk" have a special commercial meaning in the industry and cited the following cases as holding that such meaning must govern: *United States* v. *Seatrain Lines,* 329 U.S. 424; *Black* v. *Interstate Commerce Commission,* 167 F. 2d 825; and *Guyott Construction Co., Inc., Extension—Fuel Oil,* 49 M.C.C. 265. Those cases fall so far short of sustaining the proposition for which they are cited that not even the intervening appellees refer to them on motion. *cf. Suwannee Fruit & Steamship Co.* v. *Fleming,* 160 F. 2d 897 (1947).

in transportation and in the scrap industry, and moreover, have been construed by the Commission". 292 I.C.C. 688[3]

Rejecting the words of the statute, the commission substituted therefor the words "fungible" or "homogeneous". It said, "The term 'commodities in bulk' is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece." 292 I.C.C. 688 It also conceived a "category of nonbulk commodities" which are homogeneous in nature. 292 I.C.C. 691

The motions of appellees contain only a minimum discussion of this crucial question as to what the words of the statute mean. When they do touch upon the heart of the case the arguments are divergent, and result in a failure to spell out any sound basis for the commission's interpretation of the statute. The divergence lies in the fact that, whereas the barge interests argue that bulk really means fungible or homogeneous, or both, the United States and the Interstate Commerce Commission argue that scrap cannot be in bulk in the dictionary sense of that word. (U.S. p. 7) The first argument is preposterous and the second is founded on a denial of facts which the government has admitted in its pleadings.

The contention of the barge interveners centers on a fantastic assertion to the effect that the dictionary definition of "in bulk" really indicates that the material must be interchangeable or homogeneous. (Barge, p. 10-11).

No authority is or could be cited to sustain that idea. It should suffice therefore, to observe that different words may not be gratuitously treated as synonymous. However,

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[3]Such citations are to the report of the commission, which is reprinted in appellant's jurisdictional statement with original paging preserved.

we include in Part I of the Appendix hereto a statement of all the authorities known for the meaning of the words "in bulk" as compared with the meaning of the words "fungible" and "homogeneous". They are not interdependent.

The government's contention is that the assailed rejection of the words "in bulk" is based on the false factual premise that scrap is "heaped loose" in the barges. They say, "Patently it is not and cannot be 'heaped loose' into the holds of the transporting barges." (U.S. p. 7)

But the quoted statement of the government is contrary on its face to the following admission, made by both the United States and the Interstate Commerce Commission in their answers to the complaint of Serodino: (Italics supplied)

> "Answering the allegations contained in Paragraph 3 of the Complaint, the United States admits that coal is transported by the plaintiff without wrappers or containers, *loaded loose* in open-top barges."

The government argument at this point refers to handling "piece by piece" and compression into so-called bundles which, of course, are not wrapped or contained, but comprise merely coherent masses. If that is supposed to negative the term "heaped loose", we respectfully urge that the Court examine the photographic exhibits in the record, including appellant's exhibits 27 and 28 and appellees' exhibits 5, 12 and 13. If the apparent orderly stowage illustrated in exhibit 5 is significantly different from the loose heap in exhibit 27, the significance was lost upon the commission. For the commission did not decide that scrap is exempt only when heaped loose; it denies that scrap can be transported in bulk under any circumstances. (I.C.C.

Answer, par. V; U. S. Answer, par. VI). Properly speaking, if orderly stowage negatives handling in bulk, it does so only when the stowage is orderly. Yet the commission's order did not merely deny exemption to scrap so handled; it held that scrap can never be transported in bulk, not even when it is "heaped loose", as in fact appellant transports it.

We respectfully submit that the commission really rejected the common and natural meaning of the words "in bulk" and substituted a different meaning therefor.

II.

THE ACTION OF THE COMMISSION WAS CONTRARY TO THE STATUTE.

A. The words of the statute are clear and do not permit modification by the process of administrative construction.

Appellant respectfully urges that the words used in 903(b) are clear and unambiguous and sufficient in and of themselves to determine the purpose of the legislation. In such cases this Court has followed the plain meaning of the words except where it has led to absurd or futile results. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1928). Also in such cases this Court will not permit references to legislative history to add or detract from the significance of the words used. And the great weight attaching to administrative construction does not apply in cases where the construction is not doubtful, nor is such administrative construction reinforced by subsequent reenactment of the statute. (278 U.S. 278-280.)

Appellees rely upon the privilege of expertise but that is limited to cases where the agency conclusions rest "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts".

Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). There the commission was charged with the administrative duty to ascertain whether terms were "fair and equitable". 318 U.S. 85. Similarly, in the cases cited by appellees herein, the Interstate Commerce Commission was determining matters of "public convenience and necessity" within the special area of its administrative duties. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1945). *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236 (1945). But in the case at bar the commission was interpreting the words of a statute and, as appellees admit, this is a question committed by law to the reviewing court. 5 U.S.C. 1009(e), (U.S. p. 7). Other cases cited by intervening appellees[4] (Barge p. 8) are not contrary to the principles enunciated in the *Missouri Pacific* case cited above. In none of those cases was controlling weight accorded to an administrative interpretation that departed from the clear and unambiguous meaning of ordinary words. For example, the *Costanzo* case involved a single, complex and ambiguous statutory sentence containing nearly 900 words, in which there was no plain indication on the face of the statute whether the limiting clause in the first seven words applied to one of eleven categories of alien for which the statute provided deportation. Resort to the legislative history was necessary to determine the meaning, and the Court therefore considered the long-standing administrative interpretation, reinforced by subsequent legislation, to be significant.

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[4] *New York, N. H. & H. R. Co.* v. *Interstate Commerce Com.*, 200 U.S. 361, 401 (1906); *Fawcus Mach. Co.* v. *United States*, 282 U.S. 375, 378 (1931); *National Labor Rel. Bd.* v. *Denver Bldg. & Const. Tr. Co.*, 341 U.S. 675, 692 (1951); and *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

We think that the case at bar should be governed by the decision of this Court in *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944). There the administrator of the Wage and Hour Division was dealing with an exemption in the Fair Labor Standards Act in an area where he had explicit authority to define the "area of production" in which the exemption operated. The basic issue was whether the administrator could include in such definition not only spacial limits, but also a limit on the number of employees in exempted establishments. 322 U.S. 625. This Court refused to permit the administrator to enlarge the words of the statute, saying (322 U.S. 618):

> "The idea which is now sought to be read into the grant by Congress to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it."

The analogy of that case to the one at bar seems clear and direct, for it may truly be said here that the idea which the commission sought to read into the words "transportation of commodities in bulk" is not so complicated, nor is English speech so poor that the Congress could not have expressed the idea by using the words "homogeneous" and "fungible".

This Court has adhered to the words of a statute as Congress wrote in *Ex Parte Collett,* 337 U.S. 55 (1949). The Court was there deciding whether venue provisions of the Judicial Code governing "any civil action" applied to actions under the Federal Employers' Liability Act. The Court said (337 U.S. 58):

> "The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

We think that in this case the reach of "transportation of commodities in bulk" is unmistakable. It means transportation of any commodity that is carried according to the common meaning of the word bulk. That view is reinforced by the fact that the phrase was not used without qualification, but was explicitly limited by three conditions, all of which are met by scrap iron and by appellant's transportation of it.

At this point, the railroad interveners misconstrue the position of appellant, for they argue that we rely upon the limitations in 903(b) to change or enlarge the basic exemption in the first sentence thereof. (R.R. p. 3). We do not; we agree that the first sentence of 903(b) is limited rather than defined by the rest of the paragraph. However, the position of appellees runs contrary to the truism that the expression of one thing excludes another. For when Congress limited the exemption of bulk transportation to commodities that were so transported as of June 1, 1939, and are now being transported not more than three at a time and in tows where all the vessels navigated as a unit shall be considered as one, the omission of any explicit limitation to homogeneous or fungible commodities forbids its inclusion by the process of interpretation.

The commission and the appellees read out of 903(b) all but the first 17 words in favor of an esoteric concept of the meaning of "commodities in bulk". But as Congress wrote the law, it used the words "in bulk" in the broad and only sense which those words carry, and then proceeded to place limitations upon the exemption by elaborate and careful provisions as to the conditions under which bulk carriage would be exempt.

B. The regulatory purposes of Congress do not validate the commission's interpretation of the statute.

Appellant does not urge that 903(b) should be given an interpretation in which the context and broad purposes of the statute are ignored in favor of a literal application of the words used. Instead, appellant's interpretation of the paragraph is reinforced by the context. Reference to the other exemptions contained in the section demonstrate that Congress intended the words of 903(b) to be used in their common import without gloss. The Court was considering similar context when it said, "When Congress wants to give wide discretion it uses broad language". 322 U.S. 614.

We refer particularly to the provisions of section 303(e)(2) of the Interstate Commerce Act, 49 U.S.C. 903(e)(2).[5]

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[5]"It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by

In this paragraph, Congress clearly and explicitly authorized the commission to determine upon application whether a contract carrier should be exempted because its transportation was not competitive with common carriers by reason, among other things, of "shipment in bulk". But Congress did not provide any such discretionary authority in the commission with respect to 903(b).

The commission did not base its interpretation of 903(b) upon a supposed adherence to Congressional purpose or regulatory necessity and it explicitly disavowed reliance upon legislative history.[6]

Nevertheless, appellees would bolster the commission's interpretation by the assertion that when Congress enacted 903(b) it was thinking only of coal, grain, iron ore,

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water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

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[6]The commission said 292 I.C.C. 687:

> "Considerable reliance is placed, rather, upon excerpts from the legislative history of part III of the act. However, no reference is made to any expression in any congressional committee report or to any statement made on the floor of either House of the Congress when the bills which later became part III of the act were under discussion which throws any light upon the intended meaning of the words 'in bulk' as used in section 303(b). Reference is made to a Canadian act from which it appears that iron and steel scrap and pig iron were expressly named therein in a list of commodities as 'goods in bulk.'"

limestone and other fungibles. They base that assertion upon so-called legislative history, including a reference to statements of counsel proposing the exemption. (U.S. p. 6)

Examination of their footnoted reference[7] reveals that one Gilbert L. Johnson suggested to the Senate Committee on behalf of the Lake Carriers Association an exemption provision which would have listed the commodities eligible for exemption, as follows: (p. 494 of transcript of Senate hearings)

> "Nothing in this act shall apply to the transportation in bulk (that is, not bundled or enclosed in containers) in vessels navigating the Great Lakes of ores, minerals, stone, cement, sand, gravel, coal, coke, grain, seed, flaxseed in bags, liquids, timber, lumber, pig iron, steel products, and iron and steel scrap."

In the House, Mr. Johnson argued for a similar form of exemption, as follows (pp. 1669-1688 of transcript of House hearings):

> "None of the provisions of this title shall apply to water carriers transporting goods and commodities in bulk on the Great Lakes. Goods and commodities, in bulk shall mean the following goods and commodities, not bundled or enclosed in containers: Ores, minerals, stone, cement, sand, gravel, coal, coke, grain, seed, flaxseed in bags, liquids, timber, lumber, pig iron, steel products, and iron and steel scrap."

But Mr. Johnson did not press for the entire list, and limited his testimony before the Senate Committee as follows (p. 491 of transcript of Senate hearings):

> "Please let me make a general statement here that everything I am saying is limited to this particular field of the four commodities (iron ore, grain, coal, limestone). I am not talking about the other interests. We have some people in the association who do carry

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[7] The following passages are those which the barge interests quoted to the Commission on brief.

> other commodities, but they are not asking that you give any special recognition to them. It is only with respect to these four essential commodities that we are asking you to give us special recognition."

Apparently the appellees would argue here that the failure of the lake carrier spokesman to insist upon the larger list of commodities shows that Congress included only the smaller list in the unqualified words "in bulk". Aside from the obvious *non sequitur,* the reference to such expressions as an aid to judicial construction of a statute has the appearance of "fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention." 3 Van. L.R. 411. See *Shapiro* v. *United States,* 336 U.S. 1, 47 (1948) The commission's expressed view is the most charitable to its own conclusions in saying that there is nothing in the legislative history which "throws any light upon the intended meaning of the words 'in bulk' ". When that is so, the words must be taken in their common import.

Other references to legislative history (Barge p. 16) do not sustain the commission's limitation on the scope of the words "in bulk" because, as the quotation from Eastman shows, his list was prefaced by the words "such as" and was exemplary, not exclusive.

This feature of the case at bar decisively distinguishes it from *National Labor Rel. Bd.* v. *Hearst Publications,* 322 U.S. 111 (1944), and *United States* v. *American Trucking Associations,* 310 U.S. 534 (1940) on which appellees rely to sustain the unlimited power of interpretation which the commission has attempted to exercise here.

It is true that in those cases the court approved an interpretation of the word "employees" different from its ordinary or dictionary meaning. But the key to the cases

lies in the consideration which the Court gave to the broad purposes and clear intent of the statutes as a whole.

In *American Trucking Association,* the court held that the power of the Interstate Commerce Commission to prescribe maximum hours of service was limited to employees affecting safety of operations, one of the principal aims of the legislation. Similarly, in the *Hearst* case, the Court held that the word "employees" was not limited to its common law meaning, but included employees in a broad sense dictated by the purpose of the Wagner Act to treat labor relations on a broad, national scale. Compare *Packard Motor Co.* v. *National Lab. Rel. Bd.,* 330 U.S. 485 (1947), wherein the Court adhered to the literal meaning of the word "employees", and the division in the Court appears to have centered upon differences as to the Congressional purpose.

Finally, it should be emphasized that appellees rely upon these cases in support of summary motions to affirm. Yet in the cited cases, and notwithstanding the weight which the Court gave to administrative determination, the Court actually gave plenary consideration to the questions presented and made an independent determination of the meaning of the statutory words used. To extend the precedent there established to the extreme of summarily disposing of this appeal, would be to abdicate the office of judicial review. This is particularly so in view of the failure of the court below to explicate its decision dismissing the complaint.

C. The commission's interpretation of 903(b) is not a valid, long-standing administrative construction.

Appellees represent that the commission's interpretation of 903(b) is sustained by a long-existing administrative construction. (U.S. p. 4-5; Barge p. 7-9; 12-14). They

reflect expressions of the commission in its report of the case. 292 I.C.C. 688. But this is mere pretense to bolster a re-writing of the statute, as is manifested by the commission's own characterization of the case, 292 I.C.C. 682:

> "A cease and desist order against the defendants is sought. The principal objective of the complainants, however, is an authoritative determination as to whether transportation of scrap iron is or is not within the exemption provisions of section 303(b) of the act."

If the pretended long-standing construction of 903(b) really existed, nothing the commission could do would make it more "authoritative", and the "principal objective of the complainants" would have been merely to stop defendant (appellant) by a cease and desist order.

The truth is that in the case at bar the commission officially adopted for the first time a mere dictum of its Division 4 in *Mulqueen Contract Carrier Application,* 250 I.C.C. 436 (1942). Never before had the *Mulqueen* concept been established as a binding interpretation of the law. Nor was it dignified or reinforced by the citations to other reports as set forth in Appendix B of the commission's report in the case at bar. (292 I.C.C. 693) and as enlarged in the footnotes of the motion for the barge line interests. (Barge, p. 12, 13).

We would not labor the point [8] in view of this Court's

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[8]In view of the insistence of appellees upon the existence of long-standing administrative construction, we show in Part II of the Appendix, by way of example only, that not only is the contention inapplicable because of the plain terms of the statute, but it is based upon factual illusion. For purposes of such example, we assume that the cases in which the commission is supposed to have held a commodity to be non-bulk, are the most significant.

holding that administrative construction will not validate a departure from the clear and unambiguous words of a statute. (278 U.S. 269). This principle is being consistently followed by the lower courts in cases involving misinterpretation by the Interstate Commerce Commission of exemption provisions of the Interstate Commerce Act, cases which do not even reach this Court.

The commission decided that redried tobacco was not an agricultural commodity so as to be exempt under 49 U.S.C. 303(b)(6). But a district court in Kentucky concluded that the commission was wrong and made an independent determination that the material was exempt. *Interstate Commerce Commission* v. *Yeary Transfer Co., Inc.,* 104 F. Supp. 245 (D.C., E.D., Ky., 1952). The first conclusion of law adopted by the Court in that case was as follows:

> "1. The rule of strict construction of exemptions upon which plaintiff relies should not be applied to the extent of requiring a result contrary to the clear intent of the law. Neither should the rule attributing great weight to contemporaneous administrative rulings be applied to require the Court to follow such rulings when they are found to be clearly wrong. *Interstate Commerce Commission* v. *Service Trucking Co.*, 3 Cir., 186 F. 2d 400; *Interstate Commerce Commission* v. *Love*, D.C., 77 F. Supp. 63, affirmed, 5 Cir., 172 F. 2d 224."

In the *Love* case, the commission had taken the position that headless shrimp packed in ice were not an agricultural commodity so as to be exempt; the court decided otherwise. *Interstate Commerce Commission* v. *Love* 77 F. Supp. 63 (D.C., E.D., La., 1948). The Court said:

> "One of the cardinal rules of interpretation is that the meaning of a statute is to be ascertained from the *words used* and the subject matter to which they relate. The words used are to be taken in their usual and popular sense, except where they are technical, and then according to the acceptation of those learned in the art. (Italics used by the court.)"

In *Interstate Commerce Comm'n* v. *Service Trucking Co.*, 186 F. 2d 400 (C.A. 3rd, 1951), the commission had decided that crated eggs in the shell were not an agricultural commodity; the court decided otherwise, saying, in the words of a quoted opinion:

> "... where the question is one not wholly dependent upon matters within the expert, technical or statistical field in which the regulatory body is preeminently qualified to judge, but which primarily involves jurisdiction the force of the administrative rulings is less than it would otherwise be."

Interstate Commerce Commission v. *Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (N.D., Iowa, 1953); Aff. 212 F. 2d 555 (C.A. 8th, 1954); cert den. 348 U.S. 836, is the most recent case in which the courts have passed upon the extent of exemptions in the Interstate Commerce Act. There the commission held that dressed and eviscerated poultry were not agricultural commodities; the court decided the commission position was contrary to law and refused to compel the defendant to stop transporting the commodities without a certificate from the commission.

These were cases in which the commission went into court as a plaintiff to enforce the statute as the commission understood it. However, we know of no principle by which the courts should give the commission greater standing here as a defendant than it had in those cases as a plaintiff. The quoted finding from *Yeary* indicates that full weight was given there to the principle of expertise.

D. No custom of the trade validates the commission's interpretation of 903(b).

Appellees urge that the commission's interpretation of the words "in bulk" is reinforced by long acceptance and conformity in the water-carrier industry. (Barge p. 8) This is coupled with repeated assertions that Serodino

alone transports scrap as an exempt commodity. (U.S. p. 4, 7; Barge p. 4, 8) The argument becomes full blown in the extreme statement of the barge interests that this appeal is unsubstantial because appellant's co-defendant did not contest the decision and four non-regulated carriers that intervened before the commission are not appearing by name in this Court. (Barge p. 6) Of course appellant's standing in this Court does not depend upon the number of parties on a side.

As for the custom in the trade, that was the sole basis for the commission's view that the words of the statute are open to construction. 292 I.C.C. 688.[9]

A substantial answer to this is that the reference in 903(b) to the "existing custom of the trade" does not lay open to construction the words "commodities in bulk" because it does not apply thereto. The statute says:

> "This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count."

Grammatically, the parenthetical phrase modifies the verbs, "are loaded and carried and received and delivered". It does not modify the subject, "commodities in bulk".

Anyway, there was no contrary custom in the trade with respect to whether or not scrap was handled in bulk, *i.e.*, heaped loose in a barge. As to that the Commission admitted there had been no deviation. 292 I.C.C. 683 The custom in the trade on which appellees rely was developed since regulation took effect and was to treat all commodities as non-exempt, whether handled in bulk or not. 292 I.C.C. 684

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[9]Except see footnote 2, p. 3.

III.

FACTS CONCERNING CONSIST OF SCRAP ARE NOT PERTINENT TO A DETERMINATION WHETHER THE TRANSPORTATION IS "IN BULK".

Appellees would parry the thrust of the statutory meaning with a many-pronged argument about the physical characteristics of scrap. While granting only the most scanty attention to the crucial and incisive meaning of the words "in bulk", and apparently recognizing the futility of sustaining the necessary substitution of words, they resort to a prolonged and repetitive discussion of the consist, grading, form and nature of the commodity. The unique character of scrap iron and steel (which is a conglomeration of material that comprised an infinite variety of identifiable articles before they were discarded and became scrap) is perfectly adaptable to appellees' legerdemain. But there is no factual bug under the chip of the law.

A revealing twist is apparent in the motion of the barge interests (p. 10-11) where they argue that "all must be the same commodity" to be exempt, and then point to the fact that scrap includes various discarded articles, even locomotive wheels and axles, motor blocks, etc. But these curious facts are not pertinent to the argument because appellees have admitted that "scrap is a commodity" (U.S. Answer, par. VI; I.C.C. Answer, par. V).

Repeated references to grading of scrap and the "scrambling of separately valued lots" is merely another attempt to evade the admission that scrap is a commodity. (Barge p. 5; U.S. p. 4).

A perfect understanding is aided by considering the commission's Administrative Ruling No. 1 (water carriers) as follows:

> "*Question*: What constitutes a 'commodity' as the word is used in section 303(b) and (c)?
>
> *Answer*: The term "commodity" as used in these subsections means an article of commerce described by the most specific and least inclusive commodity name (not trade name, grade, or generic term) properly and customarily applied to the article. For example "grain" is not a commodity inasmuch as the individual kinds of grain are properly and customarily described by the more specific and less inclusive names, *viz.*, 'wheat', 'oats', 'corn', 'barley'.

If the facts advanced by appellees have any significance, it tends only to suggest that scrap iron and steel, like grain, is not a commodity because it consists of individual kinds, such as scrap rails or scrap borings or otherwise. But that was not the basis for the commission's decision. It admits that scrap is a commodity and if the admission could be retracted, the statute would only allow a determination as to what are the commodities within the generic term. Incidentally, the commission's treatment of grain, as to which no attempt has been made to deny its eligibility to exemption, did not go so far as to break down wheat into separately valued units such as winter wheat and spring wheat, or corn into No. 2 yellow corn or No. 1 white corn.

Other facts reiterated by appellees are not only irrelevant to handling "in bulk", but wholly fail to distinguish scrap according to the commission's test of susceptibility to handling "piece by piece" as contrasted with the concept of "scoop, shovel and pour". Wide variation in shape and size is merely a matter of scale. A steel boring is not more or less susceptible to handling piece by piece than is a grain of wheat. By the same token, a chunk of iron that

measures 36″ in the cube is not more or less susceptible to being scooped, shoveled or poured than is a chunk of iron ore of the same size. The commission's report recognizes this and is constrained to admit that a bargeload of borings would therefore qualify as a commodity in bulk. 292 I.C.C. 685 It does not avoid the controlling significance of that admission to characterize the example as "extreme", because the logic extends from one extreme to the other, and the commission's decision adopted the extreme view that scrap can never be transported in bulk.

CONCLUSION.

We respectfully submit that the question presented in this case is so narrow that its determination should not have required an appeal to this Court. We think the error of the commission and of the court below is palpable and suggest that the possibility of perpetuating such an error attaches far greater importance to this appeal than would the economic question as to whether scrap may be hauled in unregulated water transportation. In these circumstances, appellant respectfully prays that this Court deny the motions to affirm and that this appeal should not be disposed of summarily or without that full explication which the court below failed to undertake.

Respectfully submitted,

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellant.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

February, 1956.

APPENDIX.

PART I.

Meaning of the term "commodities in bulk".

The natural and common import of the words "in bulk" is clearly stated in Webster's New International Dictionary, where the word "bulk" receives comprehensive definition and the term "in bulk" is defined as follows:

> "In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold *in bulk.*"

Other standard dictionaries and legal authorities concur in the Webster definition. The New Century Dictionary says:

> "Bulk [bulk, n. ME bolke, heap; prob. from Scand. (*cf.* Icel. *bulki,* heap, cargo.)] A heap or pile; cargo, etc., lying loose, and not inclosed in bags, boxes, etc.; also, the body or mass of anything; etc."

Black's Law Dictionary shows that in law the term "in bulk" has a similar meaning to that accorded by the foregoing standard dictionaries:

> "IN BULK. As a whole; as an entirety, without division into items or physical separation in packages or parcels. *Standard Oil Co.* v. *Com.,* 119 Ky. 75, 82 S.W. 1022; *Fitz Henry* v. *Munter,* 33 Wash. 629, 74 P. 1003; *State* v. *Smith,* 114 Mo. 180, 21 S.W. 493; *Feldstein* v. *Fusco,* 205 App. Div. 806, 201 N.Y.S. 4, 5; *Marlow* v. *Ringer,* 79 W. Va. 568, 91 S.E. 386, 388, L.R.A. 1917D, 619; *Mott* v. *Reeves,* 125 Misc. 511, 211 N.Y.S. 375, 380; *Fiske Rubber Co.* v. *Hayes Motor Car Co.,* 131 Ark. 248, 199 S.W. 96; *In re Lipman* (D.C.) 201 F. 169, 173."

Standard Oil Co. v. *Commonwealth,* 82 S.W. 1022, 119 Ky. 75, is typical of the cases cited in Black's Law Dictionary. The court there said:

> "The term 'in bulk' has long been understood in commercial circles as contradistinguished from 'package' or 'parcel,' as where wheat, lard and the like are sold in bulk. The common and approved usage of language, the technical meaning given by the business world, and the legal definition of the expression 'in bulk' are opposed to the idea of a number of packages, parcels, or bbls. containing merchandise being regarded as being in bulk".

At the time when the statute was enacted, on September 18, 1940, the Commission held to the same construction of the words "in bulk." In Administrative Ruling No. 2 of February 20, 1941, the Commission said:

> "A commodity in bulk is one that is not sacked, boxed, bundled or otherwise assembled, but is carried loose and is transported in the vessel without stowage except necessary separation or necessary trimming or securing to promote the safety of the vessel and cargo."

This ruling applied the test long ago expressed by the Commission in *Wholesale Fruit & Prod. Assn.* v. *A.T. & S.F. Ry.,* 14 I.C.C. 410:

> "Bulk freight, as the term is used in classifications, means freight which is loose and not put up or contained in any package. * * * The definition of bulk freight as insisted upon by the complainant is freight which is loose and not put up or contained in any package. Apples thrown into a car would be bulk freight; contained in barrels they would be package freight. The carriers generally provide in their classifications that bulk freight will not be received in less than carload lots and as used in that rule the above definition of the word bulk is probably the correct one."

See also the following statements by the Commission:

"The term 'in bulk' commonly refers to a loose mass which is poured or thrown into a vessel or vehicle without regard to order, and which is restrained during transportation only by the bottom and sides of the carrying vessel and its bulkheads. Commodities which are stowed in an orderly arrangement are not commodities in bulk. * * * *John L. Goss Corp.*, 250 I.C.C. 101-103. (1941)

"Our investigation of applicant's operations shows that, since the beginning of 1939, he has been engaged in the towage of barges loaded with commodities in bulk, consisting of sand, gravel, coke, coal, *scrap iron*, acid, and gasoline. At no time have more than three commodities been transported in the same vessel or tow. Such transportation by applicant is not subject to Part II of the Act, because Section 303(b) provides that nothing in that part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel (or two or more vessels while navigated as a unit) in which such commodities are transported is being used for the carrying of not more than three such commodities."

Ralph Raike Applications, 250 I.C.C. 177 (1942).

NOTE: In its Ruling No. 2 and in Goss the commission appears to have attached significance to the matter of orderly stowage. Whether or not this constituted a departure from the common import of the words "in bulk" is beside the point in this case because orderly stowage was not the test applied to scrap iron, although it was applied to pipe and to cut stone. (Barge p. 9)

fungible.

Webster's New International Dictionary defines the word "fungible" as follows:

"adj. 1. *Law.* Of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation;—

applied, in the Civil law and various Civil-law systems, and in jurisprudence, to things that in general are estimated in number, weight, or measure, and cannot be used except by permanently appropriating them. 2. Interchangeable; capable of mutual substitution.

n.; usually in pl. [ML. (res) *fungibles*, fr. L. *fungi* to discharge. 'Called *fungibles, quia una alterius vice fungitur.' John Taylor* (1755). See FUNCTION.] A thing that is fungible; specif., *Law*, a thing of a class or kind such that one individual or part may be used in place of any other individual or equal part in satisfaction of an obligation. The classification is important with reference to the rights of the borrower in the contract of mutuum (which see), the usufructuary of goods that perish or are alienated in the using, etc."

homogeneous.

Webster's New International Dictionary defines the word "homogeneous" as follows:

"adj. [ML. *homogeneus*, fr. Gr. *homogenes*, fr. *homos* the same + *genos* race, kind. See SAME; GENUS.] 1. Of the same kind or nature; consisting of similar parts, or of elements of the like nature;—opposed to *heterogeneous;* as *homogeneous* particles, elements, or principles."

PART II.

Administrative Construction Does Not Support Mulqueen Doctrine.

The first case where the commission decided that a commodity was not exempt under 903 is *Foreman-Gregory Co.—Exemption, Section* 303(e), 250 I.C.C. 51 (1941). In that case, the commission held that lumber was not exempt, but the decision was under Section 303(e) [49 U.S.C. 903(e)] which we have quoted above and which expressly gives the commission discretionary authority to decide what shall be exempt under that section. The commission did say in passing that lumber was not exempt

under Section 303(b) [49 U.S.C. 903(b)], but there was a sound basis for such holding, and without need to resort to a distortion of the words of the statute. In that case the commission noted, page 51, that "the lumber is carried without mark or count, applicant accepting shipper's count, without making any tally." Elsewhere, and throughout the decision, the commission refers to quantities of lumber in thousands of feet. This makes plain that in the case of lumber there is a transportation count, it being immaterial whether such count is by the carrier or the shipper, so far as the language of 903(b) is concerned.

The same comment is warranted in connection with the commission's next decision holding logs and piling to be non-exempt. *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I.C.C. 525 (1942). Like lumber, this report shows that logs and piling are subject to transportation count or measurement in feet. The decision in the case was under 903(e) and the reference to logs and piling as not bulk commodities was incidental. This is another correct decision for a wrong reason.

G. B. Zigler Co., Contract Carrier Application, 265 I.C.C. 404 (1948), was not a decision under 903(b), but was a franchise case in which the commission merely recited that the applicant had hauled commodities "other than in bulk," enumerating oil field machinery, tank steel, steel pipe, oil drilling rigs, logs, cattle, rice in sacks, sugar cane, sugar in bags, oil tanks, piling, and engine and oil-well casing. This case has nothing to do with the commission's interpretation of 903(b) and it may be assumed as a matter of common knowledge that such items as oil field machinery, rice in sacks, etc., were either subject to transportation mark or count, or were put in wrappers or containers Clearly, the determination as to any of those would be that it failed to conform to the one of the stated conditions in the exempting statute.

The case cited by the commission as holding that brick is a non-bulk commodity is *Callanan Road Improvement Co. Extension—Towage,* 285 I.C.C. 137 (1952). That was a franchise case that did not even mention 903(b) and contains no discussion of whether or not brick is exempt. Apparently, it holds inferentially that brick is non-exempt, because the commission granted franchise authority to the applicant carrier. In any event, the report shows that brick is sold and handled on a per thousand basis, which constitutes a transportation count and affords sound basis for non-exemption under the express terms of the statute, whether or not the transportation is "in bulk."

The remaining commission cases under 903(b) are the so-called *Mulqueen* line of cases which have never been reviewed and which constitute the entire weight of commission authority for the erroneous interpretation of the statute here under attack. *Mulqueen Contract Carrier Application,* 250 I.C.C. 436 (1942); *Columbia Transp. Co., Contract Carrier Application,* 250 I.C.C. 653 (1943).

FILED
MAR 1 1 1956
HAROLD B. WILLEY, Cl

No. 589

IN THE

Supreme Court of the United States

October Term, 1955

V. P. SERODINO, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From The United States District Court For The Southern District of Ohio, Western Division.

PETITION FOR REHEARING.

ROBERT N. BURCHMORE,
Attorney for Appellant.

2106 Field Building,
Chicago 3, Illinois.

McCORMICK AND HENDERSON, INC., CHICAGO

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On Appeal From the United States District Court For The Southern District of Ohio, Western Division.

PETITION FOR REHEARING.

Serodino petitions for rehearing on the ground that the judgment would unjustly reward fraudulent representations by the appellees, and on the ground that the decision needs full explication because it appears to conflict with common public knowledge.

The government and interveners have used distortion, confusion and elaborate evasions which cannot be fully exposed without the clear illumination of oral argument. We therefore pray that the Court will stay its order summarily affirming [illegible] motion, set the case for argument (as recommended by Mr. Justice Black and Mr. Justice Douglas, and in accordance with the policy of Rule 45), and upon final judgment render an opinion for the instruction of the public.

I.

The assailed order of the Interstate Commerce Commission would require appellant to stop hauling scrap iron in barges on the rivers without a certificate. Appellant stands upon section 303(b) of the Interstate Commerce Act,[1] which provides that nothing in the statute shall apply to bulk transportation by water under stated conditions.

It is common knowledge that scrap always is, and as a practical matter can only be transported in bulk. The truth is that Serodino transports scrap in bulk, as has been the invariable custom in the trade from time immemorial. That being so, and the government having conceded that all the stated conditions of exemption were met, the exemption should attach and the commission's order should be held invalid.

The government and the regulated carriers would smother the simple truth and evade the exemption. In order to manufacture a foundation for the order, they have therefore resorted to an assortment of confusing and contradictory distractions, and have concocted the prettiest mess of gobbledegook ever to issue from the halls of officialdom. Stripped of verbiage, the main proposition of interveners is that "bulk" really means "fungible" or "homogeneous". That is too hard for the government to swallow, so it offers the falsehood, expertly disguised in irrelevancies, that scrap cannot possibly be in bulk because "it is not and cannot be 'heaped loose' into the holds of the transporting barges".

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[1] 49 U.S.C. 903(b) "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect to the provisions of the Intercoastal Shipping Act, 1933, as amended."

Ordinarily, these inventions would fool no one. But the respect due and accorded to the commission and the solicitor general forbid the short shrift which the ideas themselves deserve. Unfortunately, an undertaking to furnish a reasoned disposition of the whole variety of arguments and full pretenses is likely to lend a superficial appearance of substance to the government propositions. Therefore, the process necessitates a full day in court.

II.

Interveners pretend that the proposition that "bulk" means "fungible" represents a long standing administrative construction of the statute. They provide window dressing for this idea in the form of a long list of commission reports that are supposed to instruct us on what is or is not in bulk, including scrap. But on reading, these cases turn out to have been mostly decided under a different section of the law.[2] At any rate, none of them remotely supports the substitution of "fungible" for "bulk" upon which appellees must rest this case.

Repeated references to industry custom and to supposed acceptance of the commission's views constitute mere pretense. The truth is that the invariable industry custom has been to haul scrap in bulk—it is only that the regulated carriers do not need to haul it exempt and therefore don't bother meeting the conditions necessary to exemption of bulk movement.

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[2] 49 U.S.C. 903(e)(2), unlike 903(b) gives the commission power to say what shall be exempt thereunder: "It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. * * *"

The interveners would have the Court believe that only Serodino refuses to conform; they even go to the extreme of belittling Serodino's case on the ground that parties who were on his side before the commission did not enter formal appearances in court. If such circumstances were relevant, we would testify that all Serodino's supporters are backing this appeal. We could also point to bills in Congress by which the regulated carriers have unsuccessfully sought repeal of the entire bulk exemption of section 303(b). Having failed in Congress they gain partial repeal here by the fiat of a sympathetic commission.

The commission's report writer, relying solely upon a resourceful and lively imaginative, suggested that the words of the statute have a sort of special commercial meaning which must govern. This is too patently false for appellees to pursue. It is, therefore, abandoned by them in court, leaving a most confusing question as to just where they do stand.

The words "in bulk" are not words of art, nor does acceptance of their common import produce an absurd or futile result. The words used are clear and unambiguous and forbid any resort to legislative history, administrative interpretation or other devices. The broad regulatory scheme is satisfied only by honoring the exemption as written and not by allowing the commission to re-write it. And most important, the commission was not acting in an area of expertise; it was squarely disobedient to an unqualified command of Congress, in a context that shows that the Congress knows how to be explicit when it means to allow some agency discretion.[3]

III.

The government poses the extreme proposition that scrap cannot, by its very nature, be in bulk. They stand on the monstrous statement that scrap "cannot be heaped

[3] Compare paragraphs (b) and (e) of sections 303 as quoted in footnotes above.

loose", although the commission's report reluctantly admitted that a bargeload of scrap borings would be in bulk. There is a confusion of thought here that is not designed; it is rather an inevitable result of attempting to deny the truth.

The government proposition that scrap cannot be in bulk even in the ordinary sense is a naked falsehood. But the government would enthrone it by deception and by a most elaborate recital of irrelevant facts. In one place the government states that most scrap is in bundles (compressed masses); that it is not only immaterial, it is untrue. Elsewhere the talk is about locomotive wheels and other interesting things that may be found by pawing over a scrap heap. The real stuffing, though, is the solemn discussion about the preparation of scrap, its uses, price data, grading, the size of the industry, and typical barge tows of the regulated carriers. All of this has absolutely nothing to do with bulk handling and appellees know it. All of the same tripe could be served up in connection with grain, ore, sulphur, coal or any other material of which the exemption is not even questioned. Appellees merely create a smoke screen to hide the truth.

IV.

An incalculable portion of the public (including certainly all the parties on both sides of this case, as well as everyone having knowledge of or connection with the transportation industry, the steel industry or the scrap trade) knows that scrap is always in bulk and cannot practically be handled otherwise. This is not a matter of opinion, like segregation or civil rights; it is a matter of common knowledge according to the everyday sense of the statutory language to which this Court usually requires adherence except for good cause. Therefore, when the Court affirms a decision that scrap cannot be transported in bulk, a paradox results for which some explanation is needed. To merely refer the people to the artificial commission report is to invite the ridicule which that report deserves from a discerning public.

CONCLUSION.

This petition does not document the assertions made in it. Our previous treatment of appellees arguments as if they were genuine seems merely to have played into the hands of confusion and deception. Similarly, we suggest, any request for replies hereto will produce only denials and more evasions.

We respectfully submit that truth and understanding can be insured only by having both sides stand up and spell out their propositions subject to the searching scrutiny of the Court. We pray that the Court will hear argument either on this petition or on the merits.

Respectfully submitted,

ROBERT N. BURCHMORE,
Attorney.

March, 1956.

End

No. 589. V. P. SERODINO, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction and set the case for argument. *John S. Burchmore* and *Robert N. Burchmore* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston, Robert W. Ginnane* and *H. Neil Garson* for the United States and the Interstate Commerce Commission, *Donald Macleay* for the Inland Water Carriers Freight Association, *John H. Eisenhart, Jr.* for the Great Lakes Ship Owners Association, *Harry C. Ames, Jr.* for the American Barge Line Co. et al., *R. Granville Curry* and *Frederick M. Dolan* for the Union Barge Line Corporation, and *James H. McGlothlin* for the Baltimore & Ohio Railroad Co. et al., appellees.